CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 326

J. H. STEPHENSON, W. S. FINNEGAN, P. E. ARNETT, ET AL., APPELLANTS,

vs.

T. BINFORD, O'BRIEN STEVENS, R. J. MARTIN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

FILED AUGUST 30, 1932

(37,023)

(37,023)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 326

J. H. STEPHENSON, W. S. FINNEGAN, P. E. ARNETT, ET AL., APPELLANTS,

vs.

T. BINFORD, O'BRIEN STEVENS, R. J. MARTIN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

INDEX

	Original	Print
Record from district court of the United States, Southern Texas	1	1
Præcipe for transcript	1	1
Caption (omitted in printing)	3	
Complainants' original bill of complaint	4	2
Order calling for assistance of Hon. J. C. Hutcheson, Jr., circuit judge, and Hon. Randolph Bryant, district judge	44	45
Intervention of D. A. Beard	46	47
Intervention of W. S. Finnegan and P. E. Arnett	66	62
Order calling for assistance of Hon. Duval West, U. S. district judge, in place and stead of Hon. Randolph Bryant	98	87
Answer of respondents to bill of complaint	99	88
Answer of respondents to intervention of D. A. Beard	124	101
Answer of respondents to intervention of Finnegan and Arnett	139	111
Opinion of the court, Hutcheson, J.	164	129

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1932

	Original	Print
Dissenting opinion, Kennerly, J.	178	142
Petition of intervention of B. E. Ites, V. C. Bilbo, J. T. Carroll, and A. S. Robinson	180	142
Answer of respondents to intervention of V. C. Bilbo et al.	204	165
Stipulation re hearing on permanent injunction to be had on affidavits and exhibits	210	170
Findings of fact and conclusions of law	211	171
Decree denying permanent injunction	222	180
Notice of appeal to U. S. Supreme Court	224	181
Petition for appeal	226	182
Assignments of error urged by complainant and complainant-intervenors	228	183
Order allowing appeal to Supreme Court of United States	241	194
Appeal bond (omitted in printing)	243	
Statement of evidence	246	196
Affidavits and exhibits introduced by complainant and complainant-intervenors	246	196
Affidavit of T. R. Rogers	246	196
Chas. H. Tips	247	197
D. A. Beard	248	198
Exhibit "A"—Statement showing characteristic shipments hauled by D. A. Beard, etc.	251	201
Affidavit of C. F. Petet	254	204
Affidavit of J. C. Carrington	255	205
General Order No. 26 of Railroad Commission of Texas	256	206
Affidavit of J. H. Stephenson	258	208
V. C. Bilbo et al	262	212
W. S. Finnegan and P. E. Arnett	265	215
B. E. Ites	269	220
Affidavits and exhibits introduced by respondents	272	223
Affidavit of A. J. Stone	272	223
F. W. Ruby	274	225
Robert Mayer	276	227
Certificate of C. F. Petet	277	229
Affidavit of E. M. Davis	278	229
W. R. Ely	281	233
Dan Moody	287	238
Exhibit "A"—Excerpt from message on subject of highways	288	239
Exhibit "B"—Excerpt from message on subject of motor vehicles	290	241
Affidavit of C. V. Terrell	291	242
Mark Marshall	293	245
E. E. Latham	296	248
S. G. Reed	298	249
Geo. A. Knapp	300	251
L. G. Phares	303	254
Lawrence Westbrook	306	257

	Original	Print
Registrations from 1917 to 1923	307	257
Affidavit of H. B. Lockett	308	257
Melrose Holmgreen	310	259
J. T. Farrow	311	260
E. V. Rhodes	313	262
G. A. Trumbull	314	263
J. P. Everheart	316	265
Ben E. Keith	318	266
Ira Meredith	319	267
E. C. Price	321	267
A. J. Scrivner	322	268
Sam Hanna	323	269
C. E. Hinds	325	270
F. I. Cairns	327	272
Stipulation re statement of evidence	340	285
Order settling statement of evidence	342	286
Order to transmit original exhibits	343	286
Clerk's certificate (omitted in printing)	345	
Citation and service (omitted in printing)	346	
Order extending time	348	287
Opinion per curiam	350	288
Statement of points to be relied upon and stipulation to print entire record	351	289

[fols. a & 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Equity. No. 479

J. H. Stephenson et al., Complainants,

vs.

T. Binford et al., Respondents

Præcipe for Transcript—Filed July 28, 1932

It is hereby stipulated by the original complainant, the complainant-intervenors and the respondents in the above styled and numbered cause, acting by and through their respective attorneys of record, for the purpose of indicating the portion of the record to be included in the transcript of record, that the following and no other papers be included:

1. Original Bill of Complaint of J. H. Stephenson;
2. Petition of Intervention of W. S. Finnegan and P. E. Arnett;
3. Petition of Intervention of D. A. Beard;
4. Petition of Intervention of B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson;
5. Respondents' Answer to Original Bill of Complaint;
6. Respondents' Answer to Intervention of W. S. Finnegan and P. E. Arnett;
7. Respondents' Answer to Intervention of D. A. Beard;
8. Respondents' Answer to Intervention of B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson;
9. Order of Court calling for Assistance Circuit Judge Hutcheson and District Judge Bryant;
10. Order of Court calling District Judge Duvall West, instead of District Judge Bryant;
11. Opinion of the Court, including majority opinion, by Judge Hutcheson and dissenting opinion by Judge Kennerly;
12. Stipulation as to Introduction of Testimony on Hearing for Permanent Injunction;
13. Decree of Court on Hearing for Permanent Injunction;

[fol. 2] 14. Findings of Fact and Conclusions of law;
14a. Opinion of the Court upon final hearing (none filed).
15. Notice of Appeal and Acceptance of Service thereof;
16. Petition for Appeal;
17. Assignments of Error;
18. Order Allowing Appeal;
19. Cost Bond on Appeal and Approval of Same by Court;
20. Citation and Admission of Service;
21. Order of Court Sending up Certain Original Exhibits to United States Supreme Court, to Accompany the Record on Appeal;
22. Statement of Evidence and Stipulation of All Parties Concerning Correctness of Same;
23. Order of Court Approving Statement of Evidence and Ordering Transcript of Record Forwarded to the Supreme Court;
24. This Præcipe.

Fulbright, Crooker & Freeman, Franklin & Blankenbecker, Attorneys of Record for Original Complainant, J. H. Stephenson, and Complainant-Intervenors W. S. Finnegan, P. E. Arnett, B. E. Ites, V. C. Bilbo, J. T. Carroll, and A. S. Robinson. Franklin & Blankenbecker & Jas. J. Shaw, Attorneys for Complainant-Intervenor D. A. Beard.

Copy of the foregoing præcipe was served on the undersigned as attorneys of record for the respondents in the above case, this the 28th day of July, A. D. 1932.

James V. Allred, Attorney General; T. S. Christopher, Elbert Hooper, Asst. Atty. Gen., Attorneys for Respondents.

[File endorsement omitted.]

[fol. 3] [Caption omitted]

[fol. 4] In United States District Court

[Title omitted]

Complainant's Original Bill of Complaint—Filed August 20, 1931

Now comes J. H. Stephenson a resident citizen of Houston, Harris County, Texas, hereinafter styled complain-

ant, and complains of T. Binford and O'Brien Stevens, both resident citizens of Harris County, Texas, and being the duly elected, qualified and acting Sheriff and District Attorney, respectively, of Harris County, Texas, and of R. J. Martin, a resident citizen of Harris County, Texas, and being the duly elected, qualified, and acting Constable of Precinct No. One of Harris County, Texas, and of Albert Hausser and D. R. Davis, both resident citizens of Bexar County, Texas, and being the duly elected, qualified and acting Sheriff and County Attorney, respectively of Bexar County, and of Cone Johnson, a resident citizen of Smith County, Texas, temporarily located in Travis County, Texas, and of W. R. Ely, a resident citizen of Taylor County, Texas, temporarily a resident of Travis County, Texas, and of D. K. Martin, a resident citizen of Bexar County, Texas, temporarily a resident of Travis County, Texas—the latter three being the duly appointed, qualified and acting Highway Commissioners and composing the State Highway Commission of Texas—and of L. G. Phares, a resident citizen of Travis County, Texas, and Chief of the State Highway Patrol of Texas—a department under the jurisdiction and control of the State Highway Commission of Texas, and R. S. Sterling and James V. Allred, the duly qualified and acting Governor and At-[fol. 5] torney General, respectively, of the State of Texas, both resident citizens of Travis County, Texas, and of C. V. Terrell, Lon A. Smith and Pat M. Neff—said three parties being the duly appointed, qualified and acting Railroad Commissioners composing the Railroad Commission of Texas, all of whom are resident citizens of the State of Texas and temporarily residents of Austin, Travis County, Texas, all hereinafter called respondents, and for his cause of action complainant would with respect represent unto the court as follows, to wit:

I

It is the duty of said sheriffs and constables hereinabove named as respondents, and their deputies, to make arrests for violations of the Penal Laws of Texas, whether said violations be committed in their presence or whether they be under a due complaint and to execute warrants of arrest issued pursuant to any such complaints when said viola-

tions are committed within their said respective counties. It is the duty of the county and district attorneys, hereinabove named as respondents, to prosecute all criminal complaints for alleged violations of the Criminal Statutes of the State of Texas. It is the duty of the said Highway Commission of Texas to take such steps as it properly and consistently may to the end that the Criminal Statutes of the State of Texas be enforced insofar as any alleged violations of state highway laws are concerned, and that as a medium of having said highway laws properly enforced, said Highway Commission has under its jurisdiction and control the respondent L. G. Phares, as Chief of the State Highway Patrol, and under whose control as Chief of said division of the Highway Commission, a number of highway inspectors patrol the state highways and take into custody and file complaints and seek to prosecute all parties violat- [fol. 6] ing the Highway Statutes of the State of Texas. That upon the Attorney General rests the duty of having all criminal laws of the State of Texas strictly enforced and to take proper steps of enforcement where an absence thereof exists, and that it is likewise the duty of the Governor of the State of Texas, as the chief executive of the state, to take proper steps to have all laws of the state strictly enforced. That it is the duty of the Railroad Commission of Texas, being the body to whom the Legislature of the State of Texas has delegated the many and varied powers hereinafter complained of, to act in accordance with the provisions of said statutes and that said Railroad Commission of Texas is charged with the duty of seeing that its orders, regulations, etc., are strictly adhered to and enforced.

II

Complainant alleges that on or about March 1, A. D. 1931, he entered into a verbal contract with the Southwest Freight Company, Inc., with offices at Houston, Harris County, Texas, under the terms of which complainant was to immediately begin transporting over the highways of the State of Texas, from the City of Houston, Harris County, Texas, to the City of San Antonio, Bexar County, Texas, all freight moving in the service of the Southwest Freight Company, Inc., and reaching said county via the

Morgan Line from New York, N. Y., and via the Southern Steamship Company from Philadelphia, Pennsylvania; and that at said time a definite rate to which complainant would be entitled for said transportation services was agreed upon; that thereafter the agreement had by complainant with said Southwest Freight Company, Inc., was reduced to writing—the same being in the nature of a letter written by said Southwest Freight Company, Inc., to complainant, and in which a full confirmation of the verbal agreement was made—said letter reading in words and figures as follows, towit:

[fol. 7] Southwest Freight Company, 1011 Marine Bank Building, Houston, Texas

March 2nd, 1931.

Mr. J. H. Stephenson, Houston, Texas.

Dear Sir: This letter is to confirm the verbal contract of this date entered into between us, whereby we, the Southwest Freight Company, Inc., have agreed and contracted with you to give you the truck haul from Houston, Texas, to San Antonio, Texas, on all freight moving in our service and reaching us via the Morgan Line from New York, N. Y. and via the Southern Steamship Company from Philadelphia, Pa.

It is hereby understood and agreed between us that you will enter into no contract with any other forwarding company, without first securing our permission and consent to do so. It is further, hereby agreed that this contract and agreement will remain in force for a period of one (1) year.

Your proportion of the revenue on through business will be sixty-one cents (61¢) per hundred pounds, regardless of the amount of tonnage that may be offered you at any one time. It is further agreed and understood that you will carry the necessary Cargo Insurance and on any claims that may arise, involving concealed loss, the claims will be prorated on basis of revenue and you will be expected to pay your proportion of such claims and on any claims due to loss where we, or our agents, have a clear receipt from you, you will be entirely responsible for any such claims that may accrue.

You, on your part, agree to give over-night service from Houston to San Antonio and you further agree to furnish

closed equipment, such as will meet with our approval.

Southwest Freight Company, Inc. (Sgd.) S. J. McDonnell.

Approved.

(Sgd.) T. R. Rogers, President.

Accepted.

(Sgd.) J. H. Stephenson.

III

Complainant alleges that he immediately began operating trucks over the highways of the State of Texas in pursuit of his obligations as contained in the hereinabove set [fol. 8] out contract and that in order to fulfill his obligation therein contained and to render the character of service required of him in said agreement, it was necessary for complainant to acquire considerable equipment, as will be hereinafter more fully shown and which said equipment has been continuously used by complainant since the inception of said contract and is being used by complainant at this time. That said contract has remained in force and effect since the date of its making and is in force and a valid and existing contract at this time, and that under the terms and provisions of said contract the same does not expire until March 2, 1932. In this connection, complainant would show that the contract hereinabove set out is the only contract under which he operates in carrying or transporting commodities over the highways of the State of Texas and that his said transportation of commodities over the highways of the State of Texas has at all times been confined to private contract hauling—he having been at no time engaged in the carriage of commodities as a common carrier.

IV

That immediately upon consummation of the above mentioned contract, complainant, in order to be in position to fully carry out the provisions of said contract in all matter and respects, acquired three trucks, viz., one Reo three-ton truck with semi-trailer of the Martin Van type and two one and one-half ton Chevrolet trucks, with semi-trailer Martin Stake body type, together with other equipment incidental and necessary to the proper and successful oper-

ation of said trucks—said trucks and equipment representing an investment of over Fifteen Thousand Dollars. In this connection, complainant would show unto the court that said trucks were fully equipped in strict accordance with all of the laws of the State of Texas relating to the operation of trucks on the highways of the State of Texas, [fol. 9] were duly and legally licensed and were at all times in all manners, respects and particulars operated over the highways of the State of Texas in absolute conformity with all laws of the State of Texas appertaining to the operation of such character of trucks over the highways. Complainant further says that he has transported many car loads of commodities under the terms and provisions of said contract and that he has from the time he first began operating under said contract until the present time been paid the rate and charge of sixty-one cents (61¢) per hundred pounds, regardless of the amount of tonnage and commodity transported; that said rate of sixty-one cents (61¢) per hundred pounds specified in said afore-set-out contract is the only compensation and pay complainant receives from said Southwest Freight Company, Inc., for the transportation of said freight; that under the terms of said contract and the rate to be paid him for said transportation services, complainant will earn and receive at least the sum of Ten Thousand Dollars ($10,000.00), which said sum represents the actual profit accruing to complainant out of said contract after operating expenses and overhead are deducted and due allowance made for depreciation of his equipment, and complainant desires to show that by reason of the matters and things hereinafter specifically set out, and more particularly if the Act of the Legislature herein complained of is enforced against complainant, he will sustain a loss of several thousand dollars he would otherwise earn and collect under said contract, and, furthermore, would lose a substantial amount of money on the investment made as an incident to the proper carrying out of the terms and conditions of said contract, amounting to several thousand dollars. That by reason thereof, the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum of Three Thousand ($3000.00) [fol. 10] and arises under the Constitution of the United States of America and the amendments thereto, all of which will be hereinafter more fully shown.

V

Complainant alleges that he has, without delay or interruption, made delivery of all freight moving in the service of Southwest Freight Company, Inc. and reaching said company by way of the Morgan Line from New York and the Southern Steamship Company from Philadelphia, Pennsylvania, and which he loaded on his trucks at the docks of said two steamship companies at Houston, Harris County, Texas, to the Southern Transfer Company warehouses at San Antonio, Texas, and that he at all times fully complied with his agreement to give over-night service from Houston to San Antonio. That during said time his trucks were operated, he faithfully performed said services of transportation so as to satisfy said Southwest Freight Company, Inc., with prompt and efficient deliveries. That at no time did complainant's trucks, or any one of them, have an accident of any kind or character upon the highways of the State of Texas while engaged in said transportation.

VI

Complainant would respectfully represent that there has been passed an Act by the Legislature of the State of Texas, and approved by the Governor of the State of Texas, and which becomes effective as a law of the State of Texas on August 22, 1931, which said Act is known as House Bill No. 335, which will prohibit complainant from further pursuing and carrying out the terms, provisions and conditions of the contract hereinabove set out and will [fol. 11] deter and preclude complainant from pursuing the lawful occupation of transporting goods, wares and merchandise over the highways of the State of Texas under a contract as a private carrier, in which he has hitherto been engaged, and that if said Act is enforced against complainant, it will necessarily result in complainant's being divested and deprived of the money he would otherwise have earned under and by virtue of said contract and will likewise result in the loss to complainant of a large sum of money which he spent and invested in purchasing the equipment used in operating under said contract, by reason of the fact that said equipment cannot be profitably used by complainant for any other lawful purpose in the State of Texas; said property would likewise greatly de-

preciate in value by reason of the fact that many persons, firms and corporations throughout the State of Texas would be in the same position as complainant, that is, have such equipment on their hands without being able to put same to a lawful use, and necessitating the dumping of said equipment on the market for sale and resulting in the bringing about of an extremely low market value for said trucks and equipment. That an enforcement of said Act will mean a destruction of complainant's business and that unless any attempted enforcement of said Act insofar as same is applicable to complainant is not restrained by this Honorable Court, complainant will suffer injuries of an irreparable and inestimable nature, as will be hereinafter fully and definitely shown. Said Act referred to and herein complained of reads as follows, towit:

[fol. 12] (Committee Substitute to House Bill No. 335)

A bill to be entitled—

"An Act to amend chapter 314, General Laws of the State of Texas, Forty-first Legislature, Regular Session, as amended by Chapter 24 of the General Laws of the Second Called Session thereof, so as to further regulate motor carriers transporting property for hire over the public highways; defining the terms 'person,' 'Commission,' 'Highway Commission,' 'public highway,' 'certificate,' 'permit,' 'motor carrier,' and 'contract carrier'; placing all motor carriers under the jurisdiction of the Railroad Commission of the State of Texas; providing that no motor carrier shall hereafter operate as a common carrier without having a certificate of convenience and necessity and that no motor carrier shall hereafter operate as a contract carrier without having a permit; giving to the Railroad Commission of the State of Texas power and imposing upon it the duty to fix, prescribe or approve maximum or minimum or maximum and minimum rates, fares and charges for motor carriers doing business as common carriers and minimum rates, fares and charges for motor carriers operating as contract carriers, to require all motor carriers to keep certain accounts and to file such reports as the Commission may deem

necessary, to require each operator of a motor-propelled vehicle operated by a motor carrier to have a driver's license and prescribing fees therefor and to regulate motor carriers in all other matters affecting their relationship with the shipping public and so as to relieve existing and future undue burdens on the highways; making it unlawful for a motor carrier to operate a motor-propelled vehicle unless such vehicle is operated by a driver holding an unrevoked and uncancelled license issued by the Commission; giving the Commission the power and imposing upon it the duty to approve or disapprove the nature and character of equipment used and the amount and character of tonnage carried and the number, size and method of loading containers of any commodity carried on any vehicle operated by a motor carrier under a permit or certificate; providing for the sale, lease, assignment or transfer of certificates under certain conditions and subject to the approval or disapproval of the Commission; prescribing the length of time a motor carrier my require or permit any driver or helper to remain on continuous duty with exception in cases of a certain specified emergency and providing venue for prosecution for violations of this provision; providing for the carrying and displaying of identification cards setting out the certificate or permit number and certain other information in the cab of each motor vehicle operated under this act, and making it unlawful to display such card or other insignia of authority from the Commission after the same has expired or been cancelled; providing the method for securing of certificates of convenience and necessity and permits, the requisites of applications therefor, for hearing on said applications, for the summoning of, the attendance of, the examining of and the fees for witnesses, for the filing of written opinions by the Commission in contested hearings, and giving the Commission power under certain conditions to revoke, suspend or amend any certificate or permit and providing for appeals from the decisions of the Railroad Commission of the State of Texas; providing the method for securing of certificates and permits by motor carriers lawfully operating under the present law; providing [fol. 13] that no permit shall be granted to any person

holding a permit and that no vehicle shall be operated with both a permit and a certificate; providing for the issuance of special permits to persons engaged in transporting certain specified commodities; providing for the issuance of special identification plates for motor carrier vehicles, and prescribing fees therefor; providing for the payment of annual fees for each motor vehicle operated by a motor carrier for the creation of a fund for administering the act; providing that no person now lawfully authorized to operate as a motor carrier under the present law and who has paid annual fees for the year ending September 1, 1931, shall be required to pay any additional fees; providing a portion from sales of certificates shall go to the State Treasurer for the benefit of the State Highway Fund; appropriating a fund for the administration of the act in the event revenues from licenses and fees are insufficient for that purpose; requiring that, before any certificate or permit shall be issued and before any motor carrier may lawfully operate, such motor carrier shall file with the Commission bonds and insurance policies covering loss or damage from personal injury or loss of or injury to property and containing certain designated terms, and providing that any permit will automatically expire if such insurance is not kept in force, and providing that each motor carrier shall protect his employes by taking out workmen's compensation insurance; giving any authorized inspector for the Commission power and authority to make arrests for violations of this act; making the violation of any provision of the act or any lawful ruling or order of the Commission a misdemeanor and imposing a penalty and, in addition, providing for the recovery of penalties by the State for the violation of any provision of the act or for the violation of any lawful rule or order of the Commission; providing for the remedy of injunction to enforce the act; making the giving or receiving of any commission or other consideration as an inducement to secure the transportation of property by motor carrier a misdemeanor and imposing a penalty; making the giving by any common carrier, motor carrier or the receiving by any shipper of any rebate, directly or indirectly, a misdemeanor and imposing a penalty; making the charging, demand-

ing, contracting for, collecting or receiving by any motor carrier operating as a contract carrier, of a less compensation for any service than is prescribed therefor by the Commission or the procuring, aiding or abetting any contract carrier in so doing a misdemeanor and imposing a penalty; declaring the public policy of this State with reference to the business of transpor-ing property for hire by means of motor vehicles over the highways of this State and declaring that the business of a motor carrier is impressed with the public interest; repealing all laws and parts of laws in conflict therewith; providing that if any part of this act is declared unconstitutional such decision shall not affect the validity of the remaining portions of the act and declaring an emergency."

Be it enacted by the Legislature of the State of Texas:

Section 1. That Section 1 of Chapter 314, General Laws of the State of Texas, Forty-first Legislature, Regular Session, as amended by Chapter 24 of the General Laws of the Second Called Session thereof, regulating motor carriers transporting property over public highways, be and the same is hereby amended to read as follows:

"Section 1. Definitions.—When used in this act unless expressly stated otherwise:

[fol. 14] (a) The term 'person' means and includes an individual, a firm, copartnership, corporation, company, an association or a joint stock association.

(b) The term 'Commission' means the Railroad Commission of the State of Texas.

(c) The term 'Highway Commission' means the Board of Highway Commissioners of the State of Texas.

(d) The term 'public highway' means every street, road or highway in this State.

(e) The term 'certificate' means certificate of public convenience and necessity issued under this act.

(f) The term 'permit' means the permit issued to contract carriers under the terms of this act.

(g) The term 'motor carrier' means any person, firm, corporation, company, copartnership, association or joint stock association, and their lessees, receivers or trustees appointed by any court whatsoever, owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term 'motor carrier' as used in this act shall not include, and this act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns.

(h) The term 'contract carrier' means any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier.

Sec. 2. That Section 2 of said chapter be and the same is hereby amended to read as follows:

"Section 2. No motor carrier, as defined in the preceding section, shall operate any motor-propelled vehicle for the purpose of the transportation of carriage of property for compensation or hire over any public highway in the State except in accordance with the provisions of this act; provided, however, that nothing in this act or any provisions thereof shall be construed or held to in any manner affect, limit or deprive cities and towns from exercising any of the powers granted them by Chapter 147, pages 307 to 318, inclusive of the General Laws of the State of Texas, passed by the Thirtythird Legislature, or any amendments thereto."

Sec. 3. That Section 3 of the said chapter be and the same is hereby amended to read as follows:

"Section 3. No motor carrier shall, after this act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this act, a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity requires such operation. No motor carrier shall, after this act goes into effect, operate as a

common carrier without first having obtained from the Commission a permit so to do, which permit shall not be issued until the applicant shall have in all things, complied with the requirements of this act."

Sec. 4. That Section 4 of said chapter be and the same is hereby amended to read as follows:

"Section 4. (a) The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property for compensation or hire by motor vehicle on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provisions herein contained, to prescribe all rules and [fol. 15] regulations necessary for the government of motor carriers, to prescribe rules and regulations for the safety of operations of each of such motor carriers, to require the filing of such monthly annual or other reports and other data of motor carriers as the Commission may deem necessary, to prescribe the schedules and services of motor carriers operating as common carriers, and to supervise and regulate motor carriers in all matters affecting the *the* relationship between such carriers and the shipping public whether herein specifically mentioned or not.

(b) The Commission is hereby vested with power and authority and it is hereby made its duty to require that each driver of a motor-propelled vehicle owned or operated by a motor carrier under the provisions of this act shall have a driver's license, which license shall be issued by the Commission pursuant to an examination testing the ability and fitness of the applicant and under such rules and regulations as the Commission may prescribe; provided, that every driver aforesaid shall acquire a driver's license within thirty (30) days after this act takes effect and shall annually thereafter on or before the anniversary of the date of the original license acquire a renewal thereof. Such license issued shall be for a term of one year. The Commission is empowered further to issue temporary licenses in case of emergency, for such term as the Commission may deem expedient; provided, such term shall not exceed ten (10) days and there shall be no right or privilege of renewal

thereof. The Commission is hereby authorized to collect a fee of one dollar ($1.00) for each annual license fee or renewal. The Commission may suspend or revoke any such license for cause after notice and public hearing. It shall be unlawful for any motor carrier to operate a motor-propelled vehicle in this State unless such vehicle is operated by a driver holding an unrevoked and uncancelled license issued by the Commission.

(c) The Commission is further authorized and empowered, and it shall be it*d* duty, to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the shipping public that may be necessary in the interest of the public.

(d) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters whether specifically mentioned herein or not so as to carefully preserve, foster and regulate transportation and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interests of the public.

The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the condition of the public highways, involved and the ability of said highways to carry the existing and proposed additional traffic, and the Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the commissioners courts of the several counties and to the recommendations of the local government of any municipality through or between — such motor carriers operate."

[fol. 16] Sec. 5. That Section 5 of said Chapter be, and the same is hereby, amended to read as follows:

"Sec. 5. No motor carrier shall hereafter operate as a common carrier for the transportation of property for

compensation or hire over the public highways of this State without first having obtained from the Commission, under the provisions of this Act, a certificate declaring that the public convenience and necessity requires such operation; provided, however, the Commission shall, without application or hearing when this Act goes into effect, issue all motor carriers then operating lawfully under permanent certificates of public convenience and necessity heretofore issued to them, certificates in lieu of the certificates issued under the terms of the former law covering the same routes that said common carrier shall have been operating over, and no more.

Any certificate held, owned or obtained by any motor carrier operating as a common carrier under the provisions of this Act may be sold, assigned, leased, transferred or inherited; provided, however that any proposed sale, lease, assignment or transfer shall be first presented in writing to the Commission for its approval or disapproval, and the Commission may disapprove such proposed sale, assignment, lease or transfer if it be found and determined by the Commission that such proposed sale, assignment, lease or transfer is not in good faith or that the proposed purchaser, assignee, lessee or transferee is not able or capable of continuing the operation of the equipment proposed to be sold, assigned, leased or transferred in such manner as to render the services demanded by the public necessity and convenience on and along the designated route, or that said proposed sale, assignment, lease or transfer is not best for the public interest; The Commission in approving or disapproving any sale, assignment, lease or transfer of any certificate, may take into consideration all of the requirements and qualifications of a regular applicant required in this act and apply same as necessary qualifications of any proposed purchaser, assignee, lessee or transferee; provided, however, that in case a certificate is transferred that the transferee shall pay to the Commission a sum of money equal to ten per cent (10%) of the amount paid as a consideration for the transfer of the certificate, which sum of ten per cent (10%) shall be deposited in the State Treasury to the credit of the highway fund of the State; provided further, that any certificate obtained by any motor carrier or by any as-

signee or transferee shall be taken and held subject to the right of the State at any time to limit, restrict or forbid the use of the streets and highways of this State to any holder or owner of such certificate. Every application filed with the Commission for an order approving the lease, sale or transfer of any certificate of convenience and necessity shall be accompanied by a filing fee in the sum of Twenty-five Dollars ($25) which fee shall be in addition to the other fees and taxes and shall be retained by the Commission whether the lease, sale or transfer of the certificate of convenience and necessity is approved or not."

Section 6. That Section 6 of said Chapter be and the same is hereby amended so as to read as follows, and the same is hereby further amended by adding Section 6aa, Section 6bb, and Section 6cc. —.

"Section 6. (a) No motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall so operate until it shall have received a permit from the Commission to engage in such business and such permit shall not be issued until the applicant shall have in all things complied with the requirements of this act; nor shall such permit be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier. The Commission shall have the [fol. 17] power to suspend for ten (10) days any existing permit after notice and hearing and to revoke any existing permit when it appears that such permit holder has disobeyed or violated any provisions of this act or of general laws regulating motor vehicles or violated any rule or regulation of the Commission authorized by this Act.

(b) No application for a permit shall be considered by the Commission unless it be reduced in writing and set forth the following facts:

(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

(2) The application shall set forth the nature of the transportation in which the applicant wishes to engage stating substantially the territory to be covered by the operation and including the condition and character of the roads over which the transportation is to be performed.

(3) It shall give a description of each vehicle which the applicant intends to use, including weight and size of vehicle and its carrying capacity.

(c) No application for permit shall be granted by the Commission until after a hearing nor shall any such permit be granted if the Commission shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory; provided, however, any person now lawfully operating as a Class 'B' operator in this State who may desire to continue in the business of a motor carrier shall file an application for a permit or certificate under the terms of this Act within thirty (30) days after the effective date hereof and it shall be the duty of the Commission to determine such applications forthwith and such applicants may, subject to the provisions of this Act and to the orders, rules, rates and regulations of the Commission continue to operate as motor carriers pending the determination by the Commission of such application.

(d) The Railroad Commission is hereby given authority to issue upon application to those persons who desire to engage in the business of transporting for hire over the highways of this State live stock, mohair, wool, milk, live stock feed stuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain special permits upon such terms, conditions and restrictions as the Railroad Commission may deem proper, and to make rules and regulations governing such operations keeping in mind the protection of the highways and the safety of the traveling public; provided, that if this act or any section, sub-section, sentence, clause or phrase thereof, is held unconstitutional and invalid by reason of the inclusion of this sub-section, the Legislature hereby declares that it would have passed this Act and any such section, sub-section, sentence, clause or phrase thereof without this sub-section."

Section 6aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.

[fol. 18] Section 6bb. No application for permit to operate as a contract carrier shall be granted by the Commission to any person operating as a common carrier and holding a certificate of convenience and necessity, nor shall any application for certificate of convenience and necessity be granted by the Commission to any person operating as a contract carrier nor shall any vehicle be operated by any motor carrier with both a permit and a certificate.

Section 6cc. No motor carrier operating in whole or in part in this State under a certificate or permit issued by the Railroad Commission of Texas, or any officer or agent of such motor carrier, shall require or knowingly permit any truck driver or his helper to drive or operate a truck for a period longer than fourteen (14) consecutive hours; and whenever such driver or helper shall have been continuously on such duty for fourteen (14) hours, he shall be relieved and shall not be required or knowingly permitted to again go on duty until he has had at least eight (8) consecutive hours off duty; and no such driver or helper who has been on such duty fourteen (14) hours in the aggregate in any twenty-four (24) hour period, shall be required or knowingly permitted to continue or again go on duty without having had at least eight (8) consecutive hours off duty; and venue for prosecution under this section shall lie in the county of the residence of the defendant; provided, that in cases of emergency caused by the act of God, the foregoing restrictions as to hours shall not apply.

Sec. 7. That Section 7 of said chapter be and the same is hereby amended to read as follows:

"Section 7. For the purpose of defraying the expenses of administering this act every motor carrier operating as

a contract carrier shall, at the time of the issuance of a permit to him and annually thereafter on or between September 1st and September 15th of each calendar year pay a special fee of ten dollars ($10) for each motor vehicle operated or to be operated by such motor carrier. If the permit herein referred to is issued after the month of September of any year the fee paid shall be prorated to the remaining portion of the year ending August 31st following, but in no case less than one-fourth (¼) the annual fee. Provided, that no person now authorized by law to operate as a Class 'A' or Class 'B' motor carrier, and who has paid annual vehicle fees required by law of the holders of certificates or permits for the year ending September 1, 1931, shall be required to pay any additional vehicle fees or additional fees incident to the issuance of certificates or permits required in this act, for the year ending September 1, 1931, in lieu of those now required by law. Every application for a permit shall be accompanied by a filing fee in the sum of ten dollars ($10) which fee shall be in addition to other fees and taxes and shall be retained by the Commission whether the permit be granted or not."

Section 8. That Section 8 of said chapter be and the same is hereby amended to read as follows:

"Section 8. The Commission is hereby vested with power and authority, and it is hereby made its duty upon the filing of an application for a certificate of public convenience and necessity to ascertain and determine under such rules and regulations as it may promulgate, after considering existing transportation facilities, and the demand for, or need of additional service, if there exists a public necessity for such service, and if public convenience will be promoted by granting said application and permitting the operating of motor vehicles on the highways designated in such application as a common carrier for hire."

[fol. 19] Sec. 9. That Section of said chapter be and the same is hereby amended to read as follows:

"Section 9. The Commission shall ascertain and determine if a particular highway or highways designated in an application for a certificate of public convenience and necessity are of such type of construction or in such state

of repair, or subject to such use as to permit of the use sought to be made by the applicant, without unreasonable interference with the use of such highways by the general public for highway purposes. And if the Commission shall determine, after hearing, that the service rendered by existing transportation facilities or agencies is reasonably adequate, or that public convenience would not be promoted by granting of said application, and the operation of motor vehicles on the public highways therein designated, or that such highway or highways are not in such state of repair, or are already subject to such use as would not permit of the use sought to be made by the applicant without unreasonable interference with the use of such highways by the general public for highway purposes, then in either or any of such events, said application may be denied and said certificate refused, otherwise the application shall be granted and the certificate issued upon such terms and conditions as said Commission may impose and subject to such rules and regulations as it has or may thereafter prescribe.

In determining whether or not a certificate should be issued to a motor carrier, the Commission shall give weight and due regard to:

(1) Probable permanence and the quality of service offered by the applicant.

(2) The financial ability and responsibility of the applicant and its organization and personnel.

(3) The character of vehicles and the character and location of depots or termini proposed to be used.

(4) The experience of the applicant in the transportation of property and the character of the bond or insurance proposed to be given to insure the protection of the public.

Sec. 10. That Section 10 of said chapter be and the same is hereby amended to read as follows:

"Section 10. No application for a certificate of public convenience and necessity shall be considered by said Commission unless it be in writing and set forth the following facts:

(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and

shall give full information concerning the financial condition and physical properties of the applicant.

(2) The complete route or routes over which the applicant desires to operate, together with the description of each vehicle which the applicant intends to use.

(3) A proposed schedule of service and a schedule of rates to be charged between the several points or localities to be served.

(4) It shall be accompanied by a plat or map showing the route or routes over which the applicant desires to operate, on which plat or map shall be delineated the line or lines of any existing transportation company or companies serving such territory, and shall point out the inadequacy of existing transportation facilities or service, and shall specify wherein additional facilities or service are required and would be secured by the granting of said application.

[fol. 20] The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the condition of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the commissioners courts of the several counties and to the recommendations of the local government of any municipality through or between which motor carriers operate."

Sec. 11. That Section 11 of said chapter be, and the same is hereby, amended to read as follows:

"Sec. 11. Upon the filing of said application for a certificate or permit, the Commission shall fix a time and place for hearing, and the place of hearing shall be in the city of Austin, Texas, unless otherwise ordered by the Commission.

Notice of the filing of said application, and the time and place of hearing, shall be given by mail not less than ten (10) days, exclusive of the day of mailing, before such hearing, addressed to the owner or owners of existing transportation facilities serving such territory as applicant seeks to serve, as well as to the Highway Commission of the State of Texas, the county judge or judges of the counties and to the mayor of any incorporated city or town through which such carrier seeks to operate."

Sec. 12. That Section 12 of said chapter be, and the same is hereby, amended to read as follows:

"Section 12. (a) The hearing on an application for certificate or permit shall be conducted under such rules and regulations as the Commission may prescribe, and the parties interested, including the Highway Commission of this State, may appear either in person or by counsel and present such evidence and argument as they may desire and as the Commission may deem pertinent in favor of or against the granting of such application. It shall be the duty of the Highway Commission, upon request of the Commission, to furnish information relating to the highway or highways designated in such application, as well as such other information as the Commission may deem pertinent to the hearing. After hearing and such investigation as the Commission may make, it shall be the duty of the Commission to grant or refuse the application, and, in any contested hearing, the Commission shall, along with its order, file a concise written opinion setting forth the facts and grounds for its action, and such opinion shall be admissible as evidence on any appeal taken therefrom; upon request of any party at interest in a contested hearing of any nature, the proceedings shall be taken down and reported by a reporter under the direction of the Commission.

(b) The Commission at any time after hearing had, upon notice to the holder of any certificate or permit and after opportunity given such holder to be heard, may by its order revoke, suspend or amend any certificate or permit issued under the provisions of this act wherein such hearing the Commission shall find that such certificate or permit holder has discontinued operation or has violated, refused or neglected to observe the Commission's lawful orders,

rules, rates or regulations or has violated the terms of said certificate or permit; provided, that the holder of such certificate or permit shall have the right of appeal as provided in this act."

[fol. 21] Sec. 13. That Section 13 of said chapter be, and the same is hereby, amended to read as follows:

"Sec. 13. Before any permit or certificate of public convenience and necessity may be issued to any motor carrier, and before any motor carrier may lawfully operate under such permit or certificate, as the case may be, such motor carrier shall file with the Commission bonds and insurance policies issued by some insurance company, including mutuals and reciprocals or bonding company authorized by law to transact business in Texas, in an amount to be fixed by the Commission under such rules and regulations as it may prescribe, which bonds and insurance policies shall provide that the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carriers so filing said insurance policies and bonds, based on claims for loss or damages from personal injury or loss of, or injury to, property occurring during the term of said bonds, and policies and arising out of the actual operation of such motor carrier, and such bonds and policies shall also provide for successive recoveries to the complete exhaustion of the face amount thereof, and that such judgments will be paid by the obligor in said bonds and insurance policies irrespective of the solvency or insolvency of the motor carriers; provided, however, such bonds and policies shall not cover personal injuries sustained by the servants, agents or employes of such motor carrier; provided further, that in the event the insured shall abandon his permit or certificate and leave the State, a claimant, asserting a claim within the provisions of said bonds or policies, may file suit against the company executing such bond or policies in a court of competent jurisdiction without the necessity of making the insured a party to said suit. Provided, however, that the Commission shall not require insurance covering loss of or damage to cargo in amount excessive for the class of service to be rendered by any motor carrier. Each such motor carrier shall, on or before the date of the expiration of the term of any policy or bond so

filed by him, file a renewal thereof, or new bonds and policies, containing the same terms and obligations of the preceding bonds and policies, and shall each year thereafter on or before the expiration date of the existing bonds and policies, file such renewal policies and bonds so as to provide continuous and unbroken protection to the public having legal claims against such motor carrier, and in the event such renewal bonds and policies are not so filed, the permit or certificate of public convenience and necessity of such motor carrier shall automatically expire and cease to exist.

Each motor carrier shall also protect his employes by taking out workmen's compensation insurance, either as provided by the Workmen's Compensation Laws of the State of Texas, or in a reliable insurance company authorized to write workmen's compensation insurance approved by the Commission."

Sec. 14. That Section 13a of said chapter be, and the same is hereby amended to read as follows:

"Sec. 13a. The Commission is vested with power and authority, and it is hereby made its duty, to approve or disapprove the nature and character of the equipment to be used under any permit or certificate and the amount and character of tonnage which may be hauled thereunder on *which may be hauled thereunder on* any motor vehicle, trailer or semi-trailer used under such permit or certificate, and in approving the amount and character of tonnage to be hauled on any such vehicles, trailers or semi-trailers under any permit or certificate, it may fix the number and size of boxes, packages, barrels or bales of any particular commodity to be transported on any such vehicles, trailers or semi-trailers, under such permit or certificate, and the method of loading such boxes, packages, barrels or bales [fol. 22] of such commodity on the motor vehicles, trailers and semi-trailers to be used under such permit or certificate; provided, however, said Commission shall not authorize the use of any equipment of greater dimensions than otherwise permitted by law, nor any tonnage of greater weight than otherwise permitted by law.

Provided, that if this section is for any reason held to be unconstitutional and invalid, such decision shall not affect the validity of the remaining portions of this act, and the

Legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that this section be declared unconstitutional; provided further, that if this act or any section, subsection, sentence, clause or phrase thereof is held to be unconstitutional and invalid by reason of the inclusion of this section, the Legislature hereby declares that it would have passed this act and any such section, subsection, sentence, clause or phrase thereof without this section."

Sec. 15. That section 13a of said chapter be, and the same is hereby further amended by adding thereto the following section, to be known as Section 13b;

"Section 13b. The Commission is hereby vested with power and authority and it is hereby made its duty to require all motor carriers to keep a set of accounts strictly in accordance with such classification of accounts and rules in respect thereto as may be established by the Commission and to file reports and such other data as the Commission may deem necessary, and which said accounts shall be open to the inspection of the Commission or its representatives at all times."

Sec. 16. That Section 15 of said chapter be and the same is hereby amended by adding thereto the following section to be known as Section 15a:

"Section 15a. Provided that any motor carrier at interest in any hearing may submit to the Commission the names and addresses of witnesses which he or it desires to use in such hearing, and it shall be the duty of the Commission to summon such witnesses."

Sec. 17. That Section 16 of said chapter be, and the same is hereby amended to read as follows:

"Section 16. (a) Every officer, agent, servant, or employe of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand, or requirement of the Commission shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of

not less than twenty-five dollars ($25) nor more than two hundred dollars ($200), and the violations occurring on each day shall constitute a separate offense.

(b) Every officer, agent, servant, or employe of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand or requirement of the Commission shall pay a penalty not exceeding one hundred dollars ($100) for each and every day of such violation. Such penalty shall be recovered in any court of competent jurisdiction in the county in which the violation occurs. Suit [fol. 23] for such penalty or penalties shall be instituted and conducted by the Attorney General of the State of Texas, or by the county or district attorney in the county in which the violation occurs in the name of the State of Texas.

(c) Upon the violation of any provision of this act, or upon the violation of any rule, regulation, or decree of the Commission promulgated under the terms of this act, any district court of any county where such violation occurs shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this act or from further violating any of the rules, regulations, orders and decrees of the Commission. Such injunctive relief may be granted upon the application of the Commission, the Attorney General or any district or county attorney. No bond shall be required when such injunctive relief is sought upon the application of the Commission, Attorney General of any district or county attorney. Such relief may be granted in suits for penalties as provided in subdivision (b) of this section, but a suit for penalty shall not be a condition precedent to the injunctive relief provided by this subdivision.

(d) Any authorized inspector for the Commission shall have the power and authority to make arrests for any violations of this act and it shall be the duty of all judges, prosecuting attorneys and peace officers of the counties and municipalities of this State to assist in the enforcement of this act.

(e) The Commission shall prescribe an identification card which must be displayed within the cab of each motor vehicle, setting out the certificate or permit number and the route or territory over which the vehicle is authorized to operate, giving the name and address of the owner of said certificate or permit. It shall be unlawful for the owner of said certificate or permit, his agent, servant or employe, or any other person to use or display said identification card after said certificate or permit has been cancelled or disposed of. The identification card provided for herein may be in such form and contain such information as required by the Railroad Commission.

(f) It shall be unlawful for any owner of a certificate or permit, his agent, servant or employe to display upon any motor vehicle the certificate or permit number, or other insignia of authority from the Railroad Commission after said certificate or permit has expired, or has been cancelled.

(g) It shall be unlawful for any motor carrier (common or contract), or the owner of a certificate or permit, or his agent, servant or employe, directly or indirectly, to offer, permit or give to any person, directly or indirectly, any commission or other consideration to induce such person to deliver to such motor carrier or certificate or permit owner, property to be transported; and it likewise shall be unlawful for any shipper or consignee or his agent, servant or employe, to receive from such motor carrier, directly or indirectly, any such commission or consideration as an inducement to secure the transportation of any such property. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not to exceed two hundred dollars ($200), and each such transaction shall constitute a separate offense.

(h) Any common carrier motor carrier, his agent, servant or employe who directly or indirectly gives to any shipper any rebate, or any shipper, his agent, servant, or employe who directly or indirectly receives any rebate, shall be guilty of a misdemeanor and shall be punished by a fine not to exceed two hundred dollars ($200) for each of-
[fol. 24] fense, in any court of competent jurisdiction in this State. It being the intention of this Act that such motor

carriers shall in every instance collect and receive, and the shipper shall pay, only the rate or fee prescribed or approved by the Commission.

(i) If any motor carrier, or any officer, agent, clerk, servant, or employe, or receiver, or his agents, servants, or employe, of any motor carrier operating as a contract carrier in this State, shall, directly or indirectly, or by any special rate rebate, drawback, or other device, for or on behalf of such contract carrier, knowingly charge, demand, or contract for, collect or receive from any person, firm or corporation a less compensation for any service rendered or to be rendered by any such contract carrier than is prescribed for said service, by said Commission, such contract carrier or any officer, clerk, servant, or employe or receiver, his agents, servants, or employe of such contract carrier shall be guilty of a misdemeanor and, upon conviction shall be fined in a sum not to exceed two hundred dollars ($200) for each offense; and every person who violates or fails to comply with, or procures, aids or abets any contract carrier in the violation of the provisions hereof shall likewise be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than two hundred dollars ($200) for each offense."

Sec. 18. That Section 17 (a) of said chapter be and the same is hereby amended to read as follows:

"Section 17. (a) For the purpose of drfraying the expense of administering this act, every common carrier motor carrier now regular operating, or which shall hereafter regularly operate in this State, shall at the time of the issuance of a certificate of convenience, and necessity, unless otherwise provided herein, and annually thereafter, on or between September 1st and September 15th of each calendar year, pay a special fee of ten dollars ($10) for each motor propelled vehicle operated or to be operated by such motor carrier in the carriage of property. If the certificate of convenience and necessity herein referred to is issued after the month of September of any year the fee paid shall be prorated to the remaining portion of the year ending August 31st following, but in no case less than one-fourth (¼) the annual fee. In case of emergency or unusual temporary demands for transportation the fee for additional

motor propelled vehicles for less period shall be fixed by the Commission in such reasonable amounts as may be prescribed by general rule or temporary order. Every application for a certificate of convenience and necessity shall be accompanied by a filing fee in the sum of twenty-five dollars ($25) which fee shall be in addition to other fees and taxes and shall be retained by the Commission whether the certificate of convenience and necessity be granted or not."

Sec. 19. That Section 18 of said chapter be and the same is hereby amended to read as follows:

"Section 18. It shall be unlawful for any motor carrier as hereinbefore defined to operate any motor vehicle within this State unless there shall be displayed and firmly fixed upon the front and rear of such vehicle an identification plate to be furnished by the Commission. Each of such plates shall be designed so as to identify the vehicle on which the same is attached as being a vehicle authorized to operate under the terms of this law: said plat- shall bear the number given to the vehicle by the Commission and such other marks of identification as may be necessary. The plates for common carrier vehicles and the plates for contract carrier vehicles shall be different in design. The identification plates provided for herein shall be in addition to the regular license plates required by law. It shall be the duty of the Commission to provide these plates and [fol. 25] each motor vehicle operating in this State shall display such plates as soon as the same are received and such plates shall be issued annually thereafter and attached to each motor vehicle not later than September 1st of each year, or as soon thereafter as possible. The Commission shall be authorized to collect from the applicant a fee of one dollar ($1) for each pair of plates so issued, and all fees for such plates shall be deposited in the State Treasury to the credit of the 'Motor Carrier Fund.' "

Sec. 20. That Section 19 (a) and (b) of said chapter be and the same is hereby amended to read as follows:

"Section 19. (a) The Commission shall have power to employ and appoint from time to time such experts, assistants, and other help, in addition to its present force, as may

be deemed necessary to enable it at all times to properly administer and enforce this act. Such persons and employes of the Commission shall be paid for the service rendered such sums as may be fixed and prescribed by the Commission in monthly installments, and no employe of the Commission shall ask or receive any fee from any person for the taking of acknowledgments or any other service except as herein provided, and such salaries, wages and all fees that may be paid to witnesses and officers shall be paid out of the Motor Carrier Fund by the State Treasurer on warrants of the Comptroller of Public Accounts on order of voucher approved by the Commission or the chairman thereof. All actual and necessary traveling expenses of the members of the Commission and employes shall also be paid out of said fund in the same manner as salaries, wages and fees when such accounts shall have been itemized and sworn to by the Commission or employe incurring the expenses and approved by the Commission or the chairman thereof.

(b) If the amount or total fees collected under the provisions of this act shall not be sufficient during any annual period to pay such salaries, costs, charges, fees and expenses then the deficit shall be paid by the State Treasurer out of any fund not otherwise appropriated. Until sufficient funds have accrued to said Motor Carrier Fund for the payment of expenses, fees, etc. as provided herein, said expenses shall be paid by the State Treasurer out of any funds not otherwise appropriated, such sum to be paid out of the general revenue not to exceed the sum of five thousand dollars ($5,000) and said sum is hereby appropriated. Any surplus remaining in the Motor Carrier Fund at the end of any fiscal year, after paying such salaries, accounts, fees and charges and after deducting such amounts as may be contracted to be paid and incurred and such sums as may be reasonably estimated by the Commission for its use pending further collection of fees, shall be paid over to the general revenue fund."

Sec. 21. That Section 22 of said Chapter be, and the same is hereby amended by adding thereto a new section, to be known as Section 22b, to read as follows:

"Sec. 22d. Declaration of Policy.—The business of operating a motor carrier of property for hire along the

highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer [fol. 26] for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charges may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public."

Sec. 22. All laws and parts of laws in conflict herewith are hereby expressly repealed. Provided, however, that nothing in this act shall be construed as giving legislative sanction to any act that would violate the provisions of the Anti-Trust Laws of Texas.

Sec. 23. If any section, subsection, clause, sentence or phrase of this act is for any reason held to be unconstitutional and invalid, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause or phrase thereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional.

[fol. 27] VII

Complainant alleges that under the terms and provisions of the aforequoted Act, he is compelled to operate his said trucks and to conduct the transportation of the commodities he hauls under his contract in strict compliance with each and every proviso contained in said Act and that his failure or refusal to do so is made by express terms of said Act, a violation of the criminal laws of the State of Texas, and subjects complainant, his agents, servants and employees to prosecution and the infliction of fines and

penalties. That said fines and penalties are severe and heavy, in that upon a conviction a punishment of not less than $25.00, nor more than $200.00 shall be inflicted, and that the violations accruing on each day constitute a separate offense; that aside therefrom the complainant would be subjected to a penalty not to exceed $100.00 for each and every day of such violation/ that if complainant should charge, demand, contract for, collect or receive a less compensation for any service rendered or to be rendered than is prescribed for said service by said Commission, or should he directly or indirectly accept any rebate or drawback making rate received less than that established by said Commission, he is subject to an additional fine not to exceed $200.00 for each offense. In this connection, complainant desires to show that on and after August 22, 1931, the effective date of said Act, it is unlawful for him to operate his said trucks over the highways of the State of Texas and to pursue the transportation of said commodities he hauls under said contract without having first obtained a permit from the Railroad Commission to engage in such business, and that by express provisions of the Act he cannot receive said permit until he has complied fully and in all things with the requirements of said Act. That in order to obtain said permit he must make an application in writing, setting forth certain facts, including all in- [fol. 28] formation concerning his financial condition and his physical properties, as well as the nature of the transportation in which he wishes to engage, stating substantially the territory to be covered by the operation, and certain other data and information. That even though complainant fully complies with all of said requirements, he is still not entitled to a permit, nor to operate his trucks over the highways of the State of Texas, nor to engage in the transportation of the commodities which he is bound to promptly haul under his contract, until after a hearing has been had before said Railroad Commission, and then if the Railroad Commission should be of the opinion after hearing had that the operation of complainant's trucks as a contract carrier "will impair the efficient public service of any authorized common carrier or common carriers, then adequately serving the same territory", the Commis-

sion, under the terms of said Act, "*shall refuse*" complainant said permit. That in truth and in fact, though the same be termed "a permit" in said Act, it is nothing other than a certificate of public necessity and convenience and virtually empowers said Railroad Commission to withhold from complainant the use of the highways of the State of Texas, in pursuit of a lawful occupation; that though it be termed a permit, it is in practical effect the identical requirement provided for in said Act applicable to common carriers before the same can operate over the highways of the State of Texas; that the only difference between the requirements in this respect of a common carrier and a contract carrier is that the common carrier must obtain a "certificate of public convenience and necessity", while the contract carrier "a permit", and that in so far as the actual effect of said Act is concerned, the word "permit" is synonymous with the phrase "certificate of public convenience and necessity". That an effort on the part of the Legislature to control and subject complainant's business, [fol. 29] unaffected as it is with public interest, but utilized solely and exclusively in the fulfillment and discharge of duties and obligations arising out of private contract, with no one but the other party to the contract at interest, by such "permit" regulation is in flagrant contravention of the 14th Amendment to the Constitution of the United States. Complainant is desirous of showing to this Honorable Court that it is not a mere question of registration that said Act prescribes, but that it involves the right of the Railroad Commission to determine that there is ample, efficient public service of an authorized common carrier or carriers adequately serving the same territory complainant serves under said contract and thereby deny to complainant his earning capacity in a legitimate line of business (Section 6 (c)).

Complainant says that none of his said three trucks is at this time operated as a Class B carrier within the meaning of the definition of Class B carriers under Acts 1929, 41st Legislature, p. 698, Chp. 314; that the same are not operated to transport or carry property for compensation or hire between two or more incorporated cities, towns, or villages, with no fixed routes, regular schedules or fixed termini or published rates, but, on the other hand, as here-

tofore pointed out, are operated under contract as a private carrier exclusively between two termini, to wit: between Houston, Harris County, Texas, and San Antonio, Bexar County, Texas, and as a fixed rate.

VIII

Complainant alleges that although he should attempt to comply with every provision of the Act complained of herein, he is not entitled to a permit and cannot operate his trucks over the highways of the State of Texas on and after [fol. 30] the effective date of this Act, nor proceed with the carrying out of the terms and provisions of the contract he now holds with Southwest Freight Company, Inc. until after his said application for a permit has been filed with the Railroad Commission and said Railroad Commission thereafter fixes a time and place for hearing, which said time and place of hearing will be in the City of Austin, Travis County, Texas, unless otherwise ordered by the Commission, and that under the terms and provisions of the Act complained of herein, notice of the filing of complainant's application and the time and place of hearing "shall be given by mail not less than ten days, exclusive of the day of mailing, before such hearing, addressed to the owner or owners of existing transportation facilities serving such territory as applicant seeks to serve, as well as to the Highway Commission of the State of Texas, the County Judge or Judges of the counties, and to the mayor of any incorporated city or town through which such carrier seeks to operate" (Section 11). That by reason thereof, even though complainant should make an application for a permit and the Railroad Commission should fix a time and place for hearing at the earlient possible time, under the provisions of said Act complainant would be prohibited from operating his trucks over the highways of the State of Texas and from transporting the commodities he undertook to haul under said contract for a period of at least ten days after the effective date of the Act; that though he should make such application for permit and same should be satisfactorily passed upon by the Commission after hearing had, complainant could not operate his trucks until after said hearing and a decision was rendered and any effort to operate his trucks and carry out his contractual obligation in

the interim would constitute a violation of said Act and subject complainant, as well as his employees, agents and servants, to arrest and prosecution and the imposition of [fol. 31] penalties aforesaid. That, on the other hand, should complainant hold in abeyance any further transportation of said commodities and any further operation of his trucks until after his application for permit was heard and passed upon, he would be guilty of breaching the contract he holds with Southwest Freight Company, Inc. and would as a result thereof lose his rights and interests in and to said contract and thereby be without the legitimate business he theretofore was engaged in, and which would occasion to complainant a loss of several thousand dollars. That such attempted regulation, amounting to a destruction of the legitimate business complainant is now engaged in, is wholly unjust, arbitrary, and without lawful basis and is in contravention of and palpably offensive to the 14th Amendment to the Constitution of the United States.

In this connection, complainant desires to point out that since the making of his said contract with Southwest Freight Company, Inc., it has been necessary for him to operate said trucks over the highways of the State of Texas between Houston, Harris County, Texas, and San Antonio, Bexar County, Texas, and that in order to comply with said contract, it has been necessary for said trucks to be in operation every day of the week; that there are two ships of the said Morgan Line and two ships of the Southern Steamship Company Line coming into port every week, necessitating the hauling to San Antonio from the docks of said steamship lines four times per week, and that said trips to San Antonio, together with the return trips, occasion the operation of all of said trucks throughout every week. That, as has been heretofore stated, prompt and immediate deliveries have to be made of all of said goods, wares and merchandise picked up by complainant as the docks of said two steamship lines to San Antonio, Texas, and any suspension of said service on the part of complainant, or delay in the delivery of said commodities, will bring about considerable loss and inconvenience to all parties concerned—to [fol. 32] the shipper and the purchaser, and will consequently result in the cancellation of the contract complainant holds, and subject complainant to an action for breach thereof and resultant damages sustained.

IX

Complainant further alleges that under and by virtue of the provisions contained in the Act herein complained of, the Railroad Commission is vested with power and authority, and it is expressly made its duty to prescribe minimum rates, fares and charges to be collected by complainant, and that under the express provision of said Act, said Railroad Commission must prescribe a rate to be charged by complainant as transportation services which shall not be less than the rates prescribed for common carriers for substantially the same service (Section 6aa), and further does complainant desire to point out that under subdivision (i) of Section 17, amending Section 16 of the former Act, complainant, under penalty of the law is prohibited from directly or indirectly, or by any special rate, rebate, drawback or other device, knowingly charge, demand or contract for, collect or receive from any person, firm or corporation a less compensation for any service rendered or to be rendered by any such contract carrier than is prescribed for said service by said Commission. That thereby complainant is by law compelled to charge for his transportation such rates as are designated by the Railroad Commission, which in no event shall be less than the charge prescribed by said Railroad Commission for common carriers for substantially the same service although he is operating under a private contract and is performing services for one particular firm; that although the public cannot possibly have any interest, either direct or indirect, in the private contract entered into by and between complainant and the Southwest Freight Company, Inc., complain-
[fol. 33] ant, under the provision of this Act, is forced and compelled to bow to the dictates of said Railroad Commission with reference to the compensation to be paid him and which he is entitled to collect for said services. That by reason thereof, complainant can no longer be guided by, nor can he operate under, private agreements reached and made between himself and the other contracting party, but must await the determination of the Railroad Commission in this particular matter.

Complainant, in this connection, alleges that as has been heretofore shown, he is receiving under the contract existing between himself and Southwest Freight Company,

Inc., a rate of sixty-one cents (61¢) per hundred pounds for all freight handled by him for said Southwest Freight Company, Inc., irrespective of the character of commodity or the amount of tonnage to be hauled. That although complainant transports under said contract various and sundry commodities, the same fall within one of the first four classes of the classification of commodities made by the Railroad Commission, and as to which said classes the Railroad Commission has established a definite and fixed rate to be charged for the transportation of same by common carriers; that the Railroad Commission has announced its intention of having said same schedule of rates continue in force as the same now stands after the Act complained of herein goes into effect, and that this complainant has been informed thereof and verily believes that the Railroad Commission will adopt and promulgate a regulation and fixation of such rates which will be the same as now exists for the transportation of commodities by common carriers. That said Act makes it the duty of said Railroad Commission to prescribe the minimum rate that can be charged by complainant, and that the minimum rate that can be charged by complainant, under the schedule now in force and effect and which said Railroad Commission will cause to continue when and after this Act goes into effect [fol. 34] for transportation of such commodities as complainant hauls from Houston to San Antonio under said contract, and being the first four classes of commodities, is as follows:

For first-class commodities, being class No. 100, $1.11 per hundred pounds;

For second-class commodities, being class No. 85, $.94 per hundred pounds;

For third-class commodities, being class No. 70, $.78 per hundred pounds;

For special commodities, being classes Nos. 65 and 60, $.72 and $.67 per hundred pounds, respectively; and

For fourth-class commodities, being class No. 55, $.61 per hundred pounds;

That under the express provisions of this Act, complainant, after said Act goes into effect, is bound by law to, charge for said services of transportation, rates no less

than those heretofore set out. That although the commodities transported by complainant for said Southwest Freight Company, Inc., under said contract, are of a miscellaneous nature, the same fall within the first three classes as per classification of the Railroad Commission, with but a negligible portion of same falling within the fourth class. That by reason thereof, complainant, being bound by the terms and provisions of his contract, will be charging and receiving a rate for said transportation of a less amount than the minimum prescribed by the Railroad Commission, and by reason thereof will be subject to arrests and prosecutions, as well as the assessment of fines and penalties. That in order to comply with the contract under which complainant operates, he cannot charge more than the specified rate of sixty-one cents (61¢) per hundred pounds for all commodities transported, by reason of all of which said Act operates as a deprivation of complainant's property, without due process of law, and is clearly violative of the 14th Amendment to the Constitution of the United States.

That by reason of the fact that said provisions of said Act complained of herein, if enforced against complainant, [fol. 35] so materially and vitally effect the terms, conditions, provisions and obligations of said contract in the manner and respects heretofore pointed out complainant's constitutional rights are invaded in that the same results in the impairment of the obligations in said contract contained and thereby violating Section 10 of Article I of the Constitution of the United States of America.

In this connection, complainant alleges that all of said shipments which he transports over the highways of the State of Texas from Houston to San Antonio constitute interstate shipments; that said provisions of said Act mentioned above prevent complainant from performing his said contract, and would in effect deprive him of the use of instrumentalities through which he conducts the transportation of interstate commerce, as a private carrier, and in this way a burden is case upon same and a direct interference with it is brought about, in violation of the commerce clause of the Constitution of the United States.

X

That said Act is an attempt on the part of the Legislature to convert complainant as a private carrier into a common carrier and that through the provisions of this Act complained of the Legislature undertakes to exercise practically the same control over complainant as it does over common carriers, and delegates to the Railroad Commission substantially the same powers and rights that govern and regulate the affairs of complainant as in the case of a common carrier. Complainant here expressly charges that although the Legislature has in said Act provided for the regulation of private carriers by inserting in some instances separate provisos as to them and separate and distinct provisos appertaining to common carriers, all of said provisions in said Act when considered together plainly show that the Legislature in said Act is endeavoring to empower the Railroad Commission with authority to conduct and handle the affairs of a private carrier as a common carrier; that as a means to accomplish said end the Railroad Commission [fol. 36] in this Act has been empowered to not only regulate the rates said private carriers can charge for his services but also to prescribe the character of bonds and insurance policies and the amounts of same that must be given before complainant as a private carrier is entitled to a permit (Section 13); said Commission is further empowered to prescribe and pass upon the number and size of boxes, packages, barrels, or bales of any particular commodity to be transported on complainant's vehicles,—the method of loading such boxes, packages, etc. (Section 13a); said Commission is given the right to require complainant as a private carrier to keep a set of accounts strictly in accordance with such classification of accounts and rules in respect thereto as may be established by the Commission and to file reports and such other data as the Commission may deem necessary (Section 13b); complainant as a private carrier is subjected to a hearing before entitled to a permit and the date of said hearing is set by the Commission and according to said Act is to be at Austin, Texas, a distance of about 170 miles from where complainant resides, unless otherwise designated (Section 11), and at which hearing the Railroad Commission is authorized to reject complainant's application for permit if it feels that his

services would interfere with those offered by common carriers serving substantially the same territory; that complainant must likewise carry Workmen's Compensation Insurance for his employes (Section 13). That all of the provisions, taken together, are tantamount to compelling complainant to dedicate his property to the quasi public use of public transportation and results in a confiscation of his property without just compensation and deprives him of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States of America.

[fol. 37] XI

Complainant further alleges that the said Act compels complainant to take out workmen's compensation insurance in behalf of his employes and that same be done either as provided by the Workmen's Compensation Laws of the State of Texas, or in a reliable insurance company authorized to write workmen's compensation insurance approved by the Railroad Commission (Section 13). In this connection, complainant desires to show that he has at the present time and has had for some time in the past, six employes in his employ; that all of said employes are engaged in the operation of said trucks in the transportation of the commodities as per complainant's contract with Southwest Freight Company, Inc. That he has not in the past, nor does he at this time, carry any workmen's compensation insurance and has no intention of purchasing or taking out such character of insurance. That under the terms and provisions of said Act herein complained of, the taking out of such workmen's compensation in behalf of his employes is a prerequisite to the granting by said Railroad Commission of any permit to complainant, and that by the terms of said Act, it is made mandatory that complainant carry such insurance. That even though said Act be construed as compelling only those who have in their employ three or more persons to acquire and purchase such insurance protection for their employes, it would compel complainant to take out such insurance. Not being entitled to such permit by reason of complainant's failure to take out said insurance, complainant, after the effective date of said Act, would become subject to arrest and prosecution, as well as the

assessment of fines and penalties upon him, and would be prohibited from transporting commodities in pursuit of said contract over the highways of the State of Texas and by reason thereof suffer a great, immeasurable and irreparable damage and injury. That to compel complainant to take out such workmen's compensation as is prescribed [fol. 38] in this Act is unjust, discriminatory and deprives complainant of his property without due process of law and without the equal protection of the law, all in contravention of the 14th Amendment to the Constitution of the United States.

That by said Act complainant is subjected to the control and regulation of the Railroad Commission with reference to the amount and character of tonnage he may haul thereunder on any motor vehicle and said Commission may fix the number and size of boxes, packages, barrels or bales and the method of loading the same (Section 13a), whereas the many persons, firms and corporations transporting their own commodities, wares and merchandise over the highways of the State of Texas are not subjected to such regulations; that complainant under said Act is prohibited from requiring or knowingly permitting any truck driver or his helper to drive or operate his truck for a period longer than fourteen consecutive hours and whenever such driver or helper shall have been continuously on such duty for fourteen hours he shall be relieved and shall not be required or knowingly permitted to again go on duty until he has had at least eight consecutive hours off duty (Section 6cc), whereas the many persons, firms and corporations carrying and transporting their own commodities and merchandise over the highways of the State of Texas are not governed or controlled by such regulations; that complainant by said Act is required to have each of his said drivers furnished a driver's license which is to be furnished by the Commission pursuant to an examination testing the ability and fitness of the applicant and under such rules and regulations as the Commission may prescribe (Section 4b) and that, on the other hand, the many persons, firms and corporations transporting their own commodities and merchandise over the highways of the State of Texas are not required to have the drivers of their motor vehicles so licensed; all of which amounts to an unjust, unreasonable

and arbitrary discrimination and denies the complainant [fol. 39] the equal protection of the law, and is, therefore, violative of the 14th Amendment to the Constitution of the United States of America.

XII

Complainant says that he must daily transport said commodities over the highways of the State of Texas between Houston, Harris County, Texas and San Antonio, Bexar County, Texas, by his motor trucks, in order to bring about a proper and due fulfillment of the contract under which he now operates. That, as has been heretofore set out, complainant cannot comply with said Act, and that it would operate manifestly in a most unjust manner to compel him to comply with said Act; that it would deprive complainant of his constitutional rights and would clearly bring about a destruction of complainant's legitimate business and a deprivation of his property, without due process of law. That by not complying with said Act, complainant, his servants, agents and employes will be confronted with numerous arrests, prosecutions and the assessment of fines and penalties and that by reason thereof, complainant's service and business will be so interrupted as to amount to a destruction of same and will bring about a cancellation of the contract at present forming his business pursuit. That complainant has been threatened with arrests and prosecutions upon his failure to fully comply with said provisions of the Act herein complained of after the same becomes effective on August 22, 1931, and that unless respondents are restrained by this Honorable Court from so doing, complainant, his agents, servants and employes will be immediately subjected to innumerable arrests and prosecutions, as well as suits, and that such arrests and prosecutions will force and compel complainant to abandon his said business. [fol. 40] Complainant says that he has no adequate remedy at law for the threatened deprivation of his rights and property as set out herein; that his threatened damages are irreparable and incapable of complete judicial ascertainment, but if ascertainable, there is nobody to whom he can look for redress, and his threatened injuries and damages are therefore irreparable and are remediable only in a Court of Equity.

Premises considered, complainant prays that citation issue as prescribed by law commanding the respondents, and each of them, to appear herein and answer this complaint; that upon hearing of this cause, said Act, in so far as the same relates to complainant's right to transport commodities as a private contract carrier from Houston, Harris County, Texas, to San Antonio, Bexar County, Texas, over the highways of the State of Texas, in pursuit and fulfillment of said contract with Southwest Freight [fol. 41] Company, Inc., which he now operates, be declared invalid; that respondents, and each of them, their successors, deputies and employes, and those under their control, as well as all other peace officers of the State of Texas, and any subdivision thereof, whose duty it is to make arrests for the violation of the Act complained of herein, and all officers of the State and any subdivision thereof whose duty it is to prosecute complaints filed for the violation of the Act complained of, be perpetually enjoined from molesting, arresting, filing complaints or charges against or prosecuting complainant, or any of his employes, for violation of said Act in the operation of his motor trucks and transportation of commodities as hereinabove set out, and from taking any steps toward molesting or arresting or filing charges or complaints against complainant, his agents, servants or employes for failure to comply with said Act and each of the respective sections thereof.

Complainant prays that in order to prevent irreparable injury to him and to fully protect him in the pursuit of his business during the pendency of this suit, this Honorable Court immediately issue a temporary injunction, enjoining and restraining said respondents, their successors, deputies and employes, and all other persons charged under the laws of the State of Texas with the enforcement of said Act, known as House Bill No. 335 and to become effective August 22, 1931, and that respondents, and each of them, and all of their respective officers, agents, appointees, employes, servants and representatives, the State Highway Patrol Officers, or their successors in office, and all other persons charged under the laws of the State of Texas with the enforcement of said Act, be temporarily restrained from doing any and all things purporting to be authorized

and warranted by said Act, in so far as the same relates to complainant, and that said temporary restraining order [fol. 42] may remain in force until the time of a hearing and determination of complainant's application herein made for a preliminary injunction enjoining the respondents as herein prayed, and complainant hereby applies for preliminary injunction and prays that same be granted against each and all of said respondents, their employes, agents and representatives, or successors in office; and complainant prays that upon final hearing said injunction may be made perpetual and permanent, and the provisions of said act hereinabove complained of be held to be in conflict with and contrary to the Constitution of the United States; and that said Act be declared void as depriving complainant of his property without due process of law and as depriving complainant of the equal protection of the laws.

Complainant further prays that he be granted such other and further relief, in law or in equity, as he may be entitled to and that he recover from respondents all costs herein expended, for all of which he will ever pray.

John H. Crooker, W. B. Bates, Leon Joworski, Fulbright, Crooker & Freeman, L. E. Blankenbecker, Franklin & Blankenbecker, Attorneys for Complainant.

Duly sworn to by J. H. Stephenson. Jurat omitted in printing.

[fol. 43] [File endorsement omitted.]

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CALLING FOR THE ASSISTANCE OF HON. JOSEPH C. HUTCHESON, JR., CIRCUIT JUDGE, AND HON. RANDOLPH BRYANT, DISTRICT JUDGE—Filed Aug. 24, 1931

Upon consideration of the bill of complaint filed herein, wherein injunction is sought to restrain defendants and their successors, deputies, employes and those under their

control from molesting, arresting, filing complaints or charges against or prosecuting complainant or any of his employes under the provisions of an Act passed by the Legislature of the State of Texas and approved by the Governor of the State of Texas and which becomes effective as a law of the State of Texas on August 22, 1931, and which said Act is known as House Bill No. 335, prohibiting the operation of a motor carrier as a contract carrier without having a permit and giving to the Railroad Commission of the State of Texas the power and imposing upon it the duty to fix and prescribe maximum or minimum, or maximum and minimum rates fares, and charges for contract carriers which shall not be less than the rate of common carrier for substantially the same service; requiring each operator of a contract carrier vehicle to have a driver's license and empowering the Railroad Commission with authority to pass rules and regulations as to same; giving the Commission the power and imposing upon it the duty to approve or disapprove the nature and character of equipment used and the amount and character of tonnage carried and the number, size and method of loading containers of any commodity carried on any vehicle operated by a contract carrier and providing the method of obtaining permits by contract carriers and that such permit shall not be granted to an applicant until after a hearing has been had after the giving of ten days notice to certain parties, unless [fol. 45] the applicant be a "B" operator at this time; requiring before any permit be issued said contract carrier file with the Commission bonds and insurance policies covering loss or damages from personal injury or loss of or injury to property and providing that said contract carrier shall protect his employes by *by* taking our Workmen's compensation and making the charging, demanding, contracting for, collecting or receiving by any motor carrier operating as a contract carrier of a less compensation for any services than is prescribed therefor by the Commission a misdemeanor, and providing for certain penalties;

It appearing to the court that the subject matter involved herein comes within the purview of Section 266 of the Judicial Code as amended, wherein it is provided that matters of this nature be heard and determined by three Judges of whom at least one shall be a Justice of the Supreme Court

or a Circuit Judge and the other two either Circuit or District Judges;

Now therefore, I do hereby call to my assistance to hear and determine the application of plaintiffs herein the Honorable Joseph C. Hutcheson, Jr., Circuit Judge and the Honorable Randolph Bryant, District Judge.

Houston, Texas, August 21, 1931.

T. M. Kennerly, Judge United States District Court, Southern District of Texas.

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF D. A. BEARD—Filed Aug. 25, 1931

Comes now D. A. Beard, a resident citizen of the City of Houston, Harris County, Texas, and having first obtained leave of the Court to intervene in this cause and to file his Original Petition of Intervention herein, and respectfully represents to the Court:

I

Complaining of the original respondents in this cause, T. Binford and O'Brien Stevens, both resident citizens of Harris County, Texas, and being the duly elected, qualified and acting Sheriff and District Attorney, respectively, of said County, and of R. J. Martin, a resident citizen of Harris County, Texas, and being the duly elected, qualified and acting Constable of Precinct No. 1 of Harris County, Texas, and of Cone Johnson, a resident citizen of Smith County, Texas, temporarily located in Travis County, Texas, and W. R. Ely, temporarily a resident citizen of Travis County, Texas, and of D. K. Martin, a resident citizen of Bexar County, Texas, temporarily a resident of Travis County, Texas, the latter three being the duly appointed and acting Highway Commission of Texas, and of L. G. Phares, a resident citizen of Travis County, Texas, and Chief of the State Highway Patrol of Texas, a department under the

jurisdiction and control of the State Highway Commission of Texas, and of R. S. Sterling and James V. Allred, the duly elected, qualified and acting Governor and Attor- [fol. 47] ney General, respectively, of the State of Texas, both residents of Travis County, Texas, and of C. V. Terrell, Lon A. Smith and Pat M. Neff, said three parties being the duly elected, qualified and acting Railroad Commission of Texas, all of whom are resident citizens of the State of Texas and temporarily citizens of Austin, Travis County, Texas, for cause of intervention herein, Intervenor respectfully represents:

II

That he is interested in the questions and issues in litigation in the above entitled suit, and that his interest in said issues is common with that of the Complainant.

III

Intervenor alleges that the matter in controversy in this intervention, exclusive of interest and costs, exceeds the sum of $3,000.00, and arises under the Constitution of the United States and the Amendments thereto. That there are other persons than those expressly named in this intervention who would be proper parties hereto, namely: District, County and City Attorneys, Sheriffs and Constables of every county in the State through which Intervenor conducts his business, as hereinafter alleged, who, together with Respondents, have charge within their respective counties of the motor vehicle act, hereinafter complained of, of the State of Texas. All such persons are not made parties hereto because they are numerous in number, and their names are unknown to Intervenor, and they are so scattered that their names and places of residence can not be ascertained without great and extraordinary difficulty, and their presence is not absolutely essential to a final determination of the matters in controversy in this intervention.

Intervenor says that the above named Respondents, under [fol. 48] the laws of the State, are in charge of and have the duty of enforcing the Criminal Laws of the State regulating and governing the traffic by motor vehicles, both as to freight and transportation upon the highways and roads

of the State, including the Act of the Legislature of Texas herein complained of, and that the said Highway Commissioners of Texas and L. G. Phares, Chief of the Highway Patrol of Texas, are specifically required by the terms of the Act herein complained of to enforce the provisions of the said Act.

Intervenor, therefore, intervenes herein not alone in his own behalf, but also in behalf of hundreds of citizens in the State similarly situated.

IV

Intervenor alleges that under the terms of an oral agreement made and entered into by and between this Intervenor and the Peden Company, of Houston, Texas, on or about the 15th day of April, 1931, Intervenor agreed to transport by motor vehicle over different public highways of this State, the goods, wares and merchandise of the said Peden Company, from Houston, Texas, to various points in the State of Texas as directed from time to time by the Peden Company, and at rates of carriage mutually satisfactory between them. Upon the making of said agreement, the Intervenor acquired a number of motor trucks and semi-trailers, representing an investment in excess of $18,000.00, and began to use, and at present is using, the same in transporting the goods, wares and merchandise of the said Peden Company over the public highways of this State in carrying out and performing the terms and obligations of the said contract as a private motor carrier for hire.

Intervenor says that said contract was agreed between [fol. 49] them to be effective so long as Intervenor was able and willing to render efficient service and so long as Intervenor handled and delivered said merchandise with reasonable dispatch and safety. Since said time, Intervenor has been carrying over the public highways of the State the said merchandise of the said Peden Company to its customers in the interior of Texas, and Intervenor has performed this service to said Peden Company in an entirely satisfactory manner, and the rate of return to him for said service paid by the Peden Company has been entirely satisfactory both to him and to it; that Intervenor since the time of entering into said employment has transported approxi-

mately 3,000 tons of merchandise for said Company and has received as compensation therefor approximately $15,000.00. He and said Company desire to continue their mutually satisfactory relations, and Intervenor says that so long as he transports said merchandise over the highways of the State according to their directions, and with reasonable promptness and efficiency, and will continue to do in the future, said contract between them will continue; that they are desirous of continuing said contractural arrangement with him for the rest of the year, and so long as he can continue transporting their commodities without unlawful interruption and interference, neither he nor the Peden Company know of any reason why their contract may not continue indefinitely, or for years, as Intervenor alleges that it will so continue if he is not prevented from carrying out the same by the unlawful interference hereinafter complained of.

Intervenor says that the relations now existing are mutually satisfactory to both of them, and the compensation charged by Intervenor and paid by the Peden Company is entirely satisfactory to both, and has been in the past [fol. 50] and will in all probability in the future be mutually changed by them to meet changing economic and other conditions whereby a reasonable return will be made to this Intervenor upon reasonable rates fixed by contract between them.

V

Intervenor says that the rates of transportation made by him with the Peden Company have been in the past substantially lower than the common carrier and railroad tariffs for transportation of commodities between corresponding points, and that his agreed rates of compensation with the Peden Company are now very substantially below the common carrier and railroad tariffs for similar service.. They are substantially below what is known as common carrier rates, that is to say, the rates prescribed by the Railroad Commission of Texas for common carrier railroads and for motor vehicles engaged in the common carrier business.

In this connection, Intervenor says that he is not now and has never been a common carrier; that his contract has been and will be in the future with the Peden Company for rates which are agreed upon between them and which Intervenor

and said Company may from time to time change or modify according to their will.

VI

Intervenor says that before engaging in the service of the Peden Company as a contract carrier, he applied to the Railroad Commission of Texas and obtained on or about February 24th, 1931, what is known as a "Class B Permit," which bore the Railroad Commission's Number 7617, by the terms of which he was authorized by the said Commission to operate what was known as a "Class B" motor carrier within the State of Texas in and around Huntsville and to and from other incorporated cities, towns and villages within the State of Texas. "Class B" operators, under which [fol. 51] said permit was taken out, were defined in an Act, known as an Act of the 41st Legislature, 1929, Chapter 314, and in Section 1-B thereof as "motor carriers who transport or carry property for compensation or hire between two or more incorporated cities, towns or villages, but who have no fixed routes, regular schedules or fixed termini or published rates."

After obtaining such permit, Intervenor proceeded to carry out his contract with the said Peden Company at various rates agreed upon between them for different distances and different destinations, according to distances, and in accordance with the nature of commodities carried, and which rates were and still are substantially less than the common carrier rates then and now existing and prescribed by the Railroad Commission of Texas under authority of the laws of the State for railroad and motor truck common carriers. The said Railroad Commission of Texas exercised no authority, nor did it attempt to exercise any authority whatever over the rates charged by Intervenor; nor was he required by the laws of the State to make any report of his rates to the Railroad Commission of Texas or to secure their approval thereof in any respect. Intervenor under his contract carried, and continues to carry, commodities of the said Peden Company to various destinations in the State of Texas as directed by it in accordance with their private agreement as to compensation for such carriage.

Intervenor says, as aforesaid, that from about the 15th day of April, 1931, he has received from said Company more

than $15,000.00 for said service, and for the remainder of the year will receive larger sums and do proportionately more transportation if not interferred with, as hereinafter alleged.

[fol. 52] VII

Intervenor says, however, that he is obligated under his said contract and in order to fulfill the same to render said transportation daily with several trucks moving in various directions in order that the merchandise of the said Peden Company may be promptly delivered from day to day as sold and contracted by them for delivery; that each day he operates several trucks in carrying the merchandise, and, if the service should be suspended, though only for an exceedingly limited time, said Peden Company would have the right to and of necessity would dispense with his service as for a breach of his contract to promptly carry its merchandise as and when presented, and, moreover, he would be liable for a breach of his contract in a suit for such damages as said Company would sustain by reason of his said breach of contract and which might and probably would result in the recovery of substantial damages from Intervenor.

Intervenor says that trucks so used by him in carrying out his contract with said Company have at all times been equipped and operated in accordance with the laws of the State and were duly licensed, as aforesaid, in conformity therewith.

VIII

Intervenor says, however, that an Act passed by the Legislature of the State of Texas and approved by the Governor and which became effective as a statute of the State of Texas on August 22nd, 1931, and known as House Bill No. 335, will prohibit Intervenor from further carrying out his said contract as such private carrier. The said Act and the caption thereof is set out fully in the original bill of the complainant in this cause, and to which bill the Intervenor here refers.

Intervenor will be required to comply with said Act in [fol. 53] the carrying out of his said private contract,

otherwise he will be subject to the severe pains and penalties thereof in the following, among other, particulars:

1. If he charges or collects a less compensation for the carriage of the commodities of the Peden Company over the public highways by motor truck than is prescribed by said Commission as the common carrier rate for a similar service or transportation, he is subject to the heavy penalties prescribed by the Act.

2. He will be subject to the penalties of the Act for operating his said trucks over the highways of the State and pursuing his business of a contract carrier with the Peden Company without first having obtained a permit from the Railroad Commission to engage in such business, and he can not receive said permit until he has complied with said Act, nor until he has obtained a hearing before said Commission; and if said Commission shall decide under the terms of the statute that the performance of said contract "will impair the efficient public service of any authorized common carrier or common carriers, then adequately serving the same territory," the Commission "shall refuse" Intervenor a permit. In this connection, Intervenor says that "a permit" as defined in said Act, is not distinguishable in substance or in form from what the Act terms "a certificate of public convenience and necessity," the latter being the provision referring to and authorizing the licensing of a common carrier, which this Intervenor is not, nor will he be in the future in carrying out his said contract, nor has he ever been in connection with said contract.

3. Said Railroad Commission must, under said Act, necessarily prescribe a rate to be charged by Intervenor [fol. 54] as transportation service, which shall not be less than the rates prescribed for common carriers for substantially the same service, and thus he is by law compelled to charge for such transportation such rates as are designated by the Commission for a common carrier, and will thereby be forced to breach his contract. Thereby it is plainly shown that the said Act endows the Railroad Commission with the power and authority to handle and conduct the affairs of this Intervenor's business as a private carrier in the same manner and with the same result as

the regulations of a common carrier are controlled by it under the Act. Thereby, in order for Intervenor to be permitted to transport commodities over the public highways of the State for hire and to carry out his contract, he is necessarily required under the provisions of the Act to make himself a common carrier.

4. Intervenor, though a private carrier, is required under the Act to keep his accounts in accordance with the classification of accounts and rules as may be established by the Commission, and he is required to file his reports and such other data as the Commission may deem necessary.

5. The Commission is authorized to reject his application for a permit if it feels that his service would "interfere," even in a relatively negligible way with the service offered by common carriers serving substantially the same territory by railroad and motor truck.

6. Intervenor must, under the Act, carry workmen's compensation insurance for his employees, covered by "insurance policies issued by some insurance company, including mutuals and reciprocals or bonding company authorized by law to transact business in Texas in an amount to be fixed by the Commission under such rules and regulations as it may prescribe," and whereby it is provided that [fol. 55] "the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carrier so filing said insurance policies and bonds, based on claims for loss or damage from personal injury or loss of or injury to property occurring during the term of said policy of bond and arising out of the operation of such motor carrier."

In his said private contractural relations with the Peden Company there is no provision made between them for Intervenor's carrying cargo or merchandise insurance; nor does the Peden Company desire him to do so in its behalf or expect him to do so. Intervenor, under said Act, is not entitled to a permit to carry out his private contract unless he takes out such cargo or merchandise insurance in behalf of the Peden Company, which the Peden Company has never expected or requested of him, nor do they now desire or expect him to carry such form of insurance for it.

7. Intervenor is further by said Act subjected to the control and regulation of the Railroad Commission with reference to the character of commodities he may haul on any motor vehicle, and it may under said Act fix the number and size of boxes, packages, barrels or bales which he may carry.

8. Intervenor is prohibited from knowingly permitting any truck driver to operate a truck for a period longer than fourteen (14) consecutive hours, at the end of which time said driver is mandatorily required to stop and take eight (8) hours off wherever he may be, although such time may through adventitious circumstances terminate while said operator is on the highways before reaching the destination.

9. Said driver under said Act must have a driver's license, furnished by the Commission pursuant to an exami- [fol. 56] nation under such rules and regulations as the Commission may prescribe.

IX

Intervenor says that said regulations, and each of them, are regulations appertaining to common carriers, in fact, not only common carriers as defined in the Act, but that such regulations which this Intervenor must comply with in order to be permitted to use the highways, are common carrier regulations and the same as imposed upon common carriers under the Act. Therefore, this Intervenor in order to be permitted to use the public highways in carrying out his contract is required in effect to become a common carrier and is required to subject himself to all common carrier regulations prescribed by the Act, contrary to his constitutional rights to use the highways as a private carrier. That the effect and intention of the Act is to protect common carriers by railroad and by motor vehicle, and thus to control competitive conditions of carriage upon the highways; that said Act is not a regulation of the highways for the preservation of the highways and the safety of those engaged in using the highways, but is a regulation of business conditions as among those using the highways in order to grant favors to one designated class of users and to restrict the other class of users, so that each class of users may be regulated in their competitive dealings.

Intervenor alleges that the purpose and effect of the Act was to make him a common carrier and to impose upon him all the restrictions of a common carrier in order that he might be unable to carry out a private contract for the operation of his trucks upon the highways. The Act exacts from him the giving up of his constitutional rights to the use of the highways as one of the public unless he will come before the Commission and make himself a commmon carrier under its provisions in order to permit him to use the [fol. 57] highways for the performance of his contract.

X

Intervenor says that the Act of the Legislature does not prohibit from anyone the use of the highways for the carriage of their own freight; that owners of their own freight may carry their commodities over the highways without restriction, but that this Intervenor is required to give up his status as a private contract carrier and to subject himself to all the regulations of a common carrier in order to carry out his private contract.

Intervenor says that the said Act gives to the Railroad Commission the power to regulate the character of commodities which he may transport for hire, whereas owners of their own commodities may transport the same without restriction from the Railroad Commission in that respect; that he is required to carry workmen's compensation insurance to cover the drivers in his employ; whereas those hauling their own commodities upon the highways, irrespective of the number of trucks used, and irrespective of the number of drivers used and the extent of the use of the highways, are not required to carry such compensation insurance for their employees; that Intervenor's drivers are limited in the hours of service upon the highways, whereas the drivers of motor trucks who are hauling their own commodities are not subject to such restrictions.

Intervenor by said Act is required that each of his drivers furnish a driver's license by the Commission, pursuant to an examination testing the ability and fitness of the applicant, under such rules as the Commission may prescribe, but Intervenor says that those transporting their own commodities and merchandise over the public high-

[fol. 58] ways of the State are not to have the drivers of their motor vehicles so licensed.

Intervenor says that he is required in order to carry out his contract to obtain a "permit", but that such permit is nothing more nor less in substantial effect than "a certificate of public convenience and necessity" required under the Act; and that the use of the two terms is a mere pretense to distinguish, without distinction in fact, and is a mere veiled attempt to distinguish in form and designation without distinction in substance and fact.

XI

Intervenor says that under Section 6-C of the Act complained of, it is provided that any person now lawfully operating as a Class B Operator who may desire to continue in the business of a motor carrier may file an application for a "permit" within thirty (30) days after the effective date of said Act, and that such applicants may, subject to the "orders, rules, rates and regulations of the Commission continue to operate as motor carriers pending the determination by the Commission of such application".

In this connection, Intervenor says that his trucks in the service of the Peden Company are not exclusively operated for said Company under the provisions of a Class B Operator as defined in the former Highway Act of the State of Texas defining Class B Carriers; that the same are not operated to transport property for compensation or hire between two or more incorporated cities, towns or villages, as prescribed by said former Highway Act, with no fixed routes, regular schedules or fixed termini, but, on the other hand, are operated under contract as a private carrier without reference to incorporated cities, towns or villages.

[fol. 59] Intervenor alleges, therefore, that although he should attempt to comply with every provision of the Act complained of herein in order to continue carrying out his contract with the Peden Company without violating said Act, he would not be entitled to a permit and can not operate his trucks over the highways of the State of Texas on and after the effective date of said Act, nor proceed with the carrying out of the terms and provisions of the contract he now holds with the Peden Company until after his application has been filed with the Railroad Commission,

and said Railroad Commission shall thereafter fix a time and place for hearing, and that under the terms and provisions of the Act notice of the filing of the application shall be given by mail for not less than ten (10) days to all existing transportation facilities serving the territory which Intervenor seeks to serve, and to the Highway Commission of Texas, County Judges of the respective counties through which Intervenor carries the commodities of the Peden Company, and to the Mayor of every incorporated city in Texas through or to which this Intervenor might from time to time desire to transport any commodity. Therefore, Intervenor says that even though he should make his application for a permit and the time and place for hearing is fixed therefor, Intervenor would be prohibited, under the provisions of said Act, from operating his trucks over the highways until the Railroad Commission had passed upon his application for a permit. In the meantime, Intervenor will be unable to operate his trucks upon the highways without violating said Act and subjecting him and his employees to arrest and prosecution and the imposing of the penalties provided in the Act. If Intervenor should hold in abeyance any further transportation and operation of his trucks under his contract with [fol. 60] the Peden Company until after his application was heard and passed upon, he would necessarily breach his contract with the Peden Company and suffer the loss of his rights and interest in said contract and his profitable business connections with said Company would be lost, with the possibility, and indeed with the probability, that it could not thereafter be reinstated, and thus the profitable business in which he is engaged under said contract would be wholly destroyed, and which would occasion to him a loss of many thousands of dollars, deprive his trucks of any profitable employment, and amount to destruction of the legitimate business Intervenor is now engaged in, and which he entered into under authority of the laws of this State, resulting in an impairment by legislative fiat of an existing contract and agreement, lawful when made, and in which the public has no interest. That such result would be in derogation of the Intervenor's constitutional rights not to be deprived of his property without due process of law and not to be denied the equal protection of the laws.

Moreover, such would not only deprive him of the many thousands of dollars which he would otherwise earn under said contract, but it would in addition result in the loss to him of a large sum of money which he has invested in acquiring the equipment used in operating under said contract, by reason of the fact that said equipment could not be profitably used for any other lawful purpose; it would greatly depreciate in value because of the fact that many persons in the State of Texas would be in the same position as Intervenor in having equipment on hand without being able to put the same to a lawful use, and necessitating placing the same on the market and thus destroying the market for such equipment.

[fol. 61] XII

Intervenor says that an enforcement of said Act as against him will mean a destruction of his business, and unless the same is restrained by this Honorable Court, Intervenor will suffer injuries of an irreparable and inestimable nature.

Intervenor says, as aforesaid, that he must transport said commodities daily over the highways by his motor trucks in order that he may retain the benefits thereof; that the Railroad Commission of Texas has announced, as Intervenor is informed and believes, that it will adopt rates for carriers such as Intervenor which will be the same as now exists by its regulations for the transportation of commodities by common carriers, and which common carrier rates, as hereinbefore alleged, are substantially higher than the contract rates between the Peden Company and this Intervenor; that said Act makes it the duty of said Commission to prescribe the minimum rates that can be charged by Intervenor, and that the minimum rates that can be charged by Intervenor, under the schedule now in force and effect and which the Railroad Commission will cause to continue in effect, will be greatly higher than the contract rates between the Intervenor and the Peden Company, and the charging of which minimum common carrier rates by Intervenor will necessarily result in the destruction and cancellation of the contract between himself and the Peden Company. That, as hereinbefore pointed out, this Intervenor can not comply with said Act

in order to continue in his business. That the Respondents herein have threatened to enforce said Act against him in all its provisions, and in fact it will be their duty so to do, unless they are restrained by injunction from this Court from so doing. That the enforcement of the same would deprive Intervenor of his constitutional rights to the use [fol. 62] of his property and rights in property without due process of law and would deny to Intervenor the equal protection of the laws.

XIII

Intervenor alleges that he and his drivers will be subjected to numerous arrests, prosecutions and fines if they violate the provisions of said Act, and the said Highway Patrol of the State of Texas will file complaints, or cause arrests and complaints to be filed, against them unless restrained from so doing by an order of this Honorable Court. It will be wholly impossible for Intervenor, without a restraining order from this Court against said Respondents and others charged with the enforcement of said Act, to retain drivers of motor vehicles in his employ in the face and certainty of repeated arrests and convictions and the imposition of the heavy penalties upon Intervenor and them which the Act imposes; that Intervenor, therefore, on account of the severe penalties of the Act, could not afford, without a restraining order from this Court, to take the risk of violating the Act so as to continue carrying out his contract.

By reason of the premises, Intervenor would otherwise be deprived of his right to use his motor vehicles upon the public highways in performance of his contract with the said Peden Company, and that by reason of the effect such Act will have in coercing this Intervenor, he will be wholly unable to proceed further with his contract.

XIV

Intervenor says that he has no adequate remedy at law for the threatened deprivation of his rights as set out herein; that the threatened damages are irreparable and [fol. 63] incapable of complete judicial ascertainment, but if ascertainable, there is nobody to whom Intervenor can

legally look to respond therefor and his threatened injuries are remediable only in a Court of Equity.

XV

Premises considered, Intervenor prays that upon a hearing of this cause said Act, in so far as the same relates to Intervenor's right to transport commodities for the said Peden Company as a private contract carrier over the public highways of this State in pursuit of his said contract, be declared invalid; that Respondents, and each of their successors, deputies, employees and those under their control, as well as all other peace officers of the State of Texas whose duty it is to make arrests for the violation of the Act complained of and prosecute Intervenor therefor be perpetually enjoined from arresting, filing charges against or prosecuting Intervenor or any of his employees for violation of said Act and the respective sections thereof herein complained of in the operation of his motor trucks, as hereinabove set out, and from taking any steps toward molesting, arresting or filing charges or complaints against Intervenor for failure to comply with said Act and each of the respective sections of the same.

Intervenor prays that in order to prevent irreparable injury to him and to fully protect him in the pursuit of his business during the pendency of this suit, that this Honorable Court immediately issue a temporary injunction enjoining and restraining said Respondents, their successors, deputies, employees, and all other persons charged under the laws of this State with the enforcement of said Act from doing any and all things purporting to be author-[fol. 64] ized by said Act in so far as the same relates to Intervenor in connection with his said contract with the Peden Company; that said temporary restraining order remain in force until the time of hearing and determination of Intervenor's application herein for a preliminary injunction; and Intervenor prays that upon final hearing said injunction may be made perpetual and permanent, and the provisions of said Act, and each of them hereinabove complained of be held to be in conflict with and contrary to the Constitution of the United States, and that said Act be declared void as depriving Intervenor of his property without due process of law and as depriving him of the equal protection of the laws.

Intervenor further prays that he be granted such other and further relief that he may be entitled to and that he recover from Respondents all costs herein expended; for all of which he will forever pray.

James J. Shaw, Franklin & Blankenbecker, Attorneys for Intervenor D. A. Beard.

Duly sworn to by D. A. Beard. Jurat omitted in printing.

[fol. 65] [File endorsement omitted.]

[fol. 66] In United States District Court

[Title omitted]

Intervention of W. S. Finnegan and P. E. Arnett—Filed August 29, 1931

Now come W. S. Finnegan and P. E. Arnett, both resident citizens of Houston, Harris County, Texas, on their own behalf and on behalf of and as representatives of all contract carriers residing and doing business in the State of Texas, all of whom belong to the same general class of residents and citizens of the State of Texas who are engaged in business as contract carriers in the State of Texas, as do the intervenors referred to by name herein and the original complainant herein, and to whom and to said intervenors referred to by name herein and to the original complainant herein, the questions and matters at issue in the above entitled suit are of common, general and mutual interest, and on behalf of all such other persons as have an interest herein and may by proper proceedings become parties hereto, and leave having been granted to them to intervene herein and to file this original petition of intervention and represent to the court that they are interested in the questions and matters in litigation in the above entitled suit, and that their interests in said questions and matters are common and general with the complainant in this suit and they desire to intervene herein and make themselves parties complainants herein, and in support of their complaint in intervention, would with respect state and allege to the court as follows:

[fol. 67] I

That at and during all the times referred to hereinafter and in the original bill of complaint herein filed by J. H. Stephenson, intervenors W. S. Finnegan and P. E. Arnett were and still are resident citizens of Houston, Harris County, Texas, and were and still are engaged in the business of transporting commodities, in trucks belonging to them, over the highways of the State of Texas as a contract carrier, and in such capacity alone. Hereinafter, in certain portions of this intervention, the foregoing named intervenors will be, as a matter of convenience and simplicity, referred to by their individual names, but when so done it is expressly intended thereby and will be understood thereby to refer to said intervenors not only in their respective individual capacities, but also in their representative capacity of the class of persons for whom they intervene herein.

II

That intervenors file this petition of intervention and maintain this suit on their own behalf and, as authorized by Equity Rules Nos. 37 and 38 of the Supreme Court of the United States, on behalf of and as representative of all persons engaged in the transportation and carriage of commodities over the highways of the State of Texas as contract carriers, and which said parties are resident citizens of the State of Texas, all of whom belong to the same general class of resident citizens of the State of Texas who are engaged in the business of transporting commodities over the highways of the State of Texas as contract carriers, as is the original complainant herein and the intervenors referred to by name herein, and to whom and to [fol. 68] said original complainant herein and to said intervenors referred to by name herein, the questions and matters at issue in the above entitled suit are of common, general and mutual interest, as well as on behalf of all others as are or may be similarly situated, and on behalf of all other persons who may elect to associate themselves with complainant and/or these intervenors. The other and additional persons on whose behalf this suit is brought, and who are not hereinabove specifically called by their names, run into the hundreds in number, but the exact number and

their identity are so subject to fluctuation and change that it would be impossible, or practically so, to make all of them parties by name, and it is impracticable to bring all of them before the court by name. Said intervenors specifically named herein fairly represent the rights and interests of those in whose behalf they bring and prosecute this petition of intervention.

That intervenors, W. S. Finnegan and P. E. Arnett, and all other contract carriers on whose behalf they hereby prosecute this complaint of intervention are at this time engaged in the carriage of commodities over the highways of the State of Texas, in trucks belonging to them, said carriage being conducted under private contract, and that said Intervenors are at this time engaged in the transportation of goods and commodities over the highways of the State of Texas, in their trucks, solely as contract carriers; that each of said intervenors holds a contract, either verbal or written, specifying the rates to be paid him, the character of service to be rendered, the term thereof and other matters common to an agreement for transportation of commodities by motor carrier. That by reason of an Act of the Legislature, and which became a law of the State of [fol. 69] Texas on August 22, 1931, hereinafter more particularly referred to, intervenors are prohibited from transporting said commodities they have been heretofore carrying under said contract over the highways of the State of Texas, and are compelled to discontinue the further pursuit of their business and carrying out of their contracts, and any effort on their part to continue the transportation of said commodities under said contracts is a violation of the Penal Laws of the State of Texas under said Act, and that intervenors, their servants and employes are, by reason of their further and continued operation as contract carriers and their continued pursuit of the fulfillment of said contracts, subject to and have been threatened with numerous and constant arrests by the Peace Officers of the several counties throughout the State of Texas, and by the State Highway Patrol Officers, and are subjected to the infliction of severe fines and penalties, and that intervenors are at this time threatened with arrests and with prosecutions for the violation of said Act and will be arrested and prosecuted and fined, unless the respondents in this suit are restrained from so doing, by order of this Honorable Court.

III

Intervenors complain of the respondents named in the first paragraph of the original bill of complaint filed herein, which said paragraph is unnumbered but sets out the names, official positions and residence of each respective respondent, and here and now adopt, approve, ratify, re-allege and confirm each and all of the allegations, matters and things set forth and contained in said paragraph of said original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and [fol. 70] things set forth and contained in this petition of intervention.

IV

Intervenors here and now adopt, approve, ratify, re-allege and confirm each and all of the allegations, matters and things set forth and contained in Article I of the original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

V

Intervenor Finnegan alleges that on or about April 23rd, A. D. 1931, he entered into a contract with West Texas Motor Freight Lines, with offices at Houston, Harris County, Texas, under the terms of which intervenor was to immediately begin transporting over the highways of the State of Texas from the City of Houston, Harris County, Texas to the City of Dallas, Dallas County, Texas, and to certain points in the Valley, to-wit: San Benito and Brownsville, in Cameron County, Texas, and McAllen, in Hidalgo County, Texas, commodities moving to said points, the same to be carried by motor truck; and that at said time a definite rate said intervenor was to receive for said transportation services was agreed upon, which said rate was forty-five cents (45¢) per hundred pounds for all of

said commodities he carried by motor truck to Dallas, irrespective of size of load and character of commodity, and fifty cents (50¢) per hundred for all of said commodities he carried by motor truck to any of said three points mentioned above in Cameron and Hidalgo Counties, irrespective of class of commodity or quantity of load. And it was further agreed that said intervenor should be entitled to [fol. 71] a rate of thirty-five cents (35¢) per hundred for all commodities carried in his motor truck from Brownsville, Cameron County, Texas, to Houston, Harris County, Texas, on return trips made by said intervenor. It was further agreed as a part of said contract that said intervenor Finnegan was obligated to render immediate service of transportation and that as soon as said commodities reached Houston over certain steamship lines, the same were to be carried by truck to Dallas or to said points in Cameron and Hidalgo Counties, without delay. In this connection, said intervenor says that all of said commodities he transported from Houston to Dallas, Cameron and Hidalgo Counties, as aforesaid, are inter-state shipments, reaching Houston over certain steamship lines, and that the commodities he is transporting at this time are shipments of the same character. That said contract of this intervenor Finnegan was entered into for a period of one year from the date of making.

VI

Intervenor Arnett alleges that about two years ago, he entered into a contract with Linde Air Products of Texas, with offices at Houston, Harris County, Texas, under the terms of which said intervenor was to immediately begin transporting over the highways of the State of Texas, by motor truck, from the City of Houston, Harris County, Texas, to points throughout the State of Texas, and principally Beaumont and Port Arthur, in Jefferson County, Texas, certain commodities consisting of oxygen cylinders, acetylene cylinders, carbide drums and rods in 100-pound bundles; that said agreement provided for immediate service of transportation on the part of this intervenor, and that whenever deliveries of said commodities were to be made to certain points designated by said Linde Air Products of Texas, this intervenor, under the terms of said contract, was to carry same by truck without delay; that

said intervenor is at this time engaged in the transporting [fol. 72] of said above named commodities as per said contract, and that under the terms and provisions of said contract, it is necessary for him to continue the transportation of said commodities as soon as deliveries of same are to be made.

That the contracts of both of said intervenors Finnegan and Arnett are valid and existing contracts and that said intervenors, in order to comply with the provisions of their respective said contracts, must continue the transportation of said commodities by their trucks over the highways of the State of Texas. That their said transportation of said commodities is in violation of said Act of the Legislature, more fully hereinafter referred to, and that if the provisions of said Act are enforced as against these intervenors, as well as the entire class of contract carriers similarly situated on whose behalf they here intervene, intervenors will be compelled to abandon the pursuit of their business that they are now engaged in, as well as the fulfillment of their contracts,—resulting in irreparable injury to them, as will be hereinafter more fully shown.

VIII

Intervenors here and now adopt, approve, ratify, re-allege and confirm each and all of the allegations, matters and things set forth and contained in Article III of complainant's original bill filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

IX

That immediately upon consummation of the above mentioned contract, intervenor Finnegan, in order to be in position to fully carry out the provisions of said contract in [fol. 73] all matters and respects, purchased an Indiana Truck with semi-trailer and other equipment of the value of Four Thousand Dollars ($4,000.00); and intervenor Arnett, in order to be in position to fully carry out the provisions of his said contract in all matters and respects, acquired two Dodge Trucks with semi-trailers and other equipment, of the value of Six Thousand Dollars

($6,000.00). In this connection, intervenors would show unto the court that said trucks were fully equipped in strict accordance with all of the laws of the State of Texas relating to the operation of trucks on the highways of the State of Texas, were duly and legally licensed and were at all times and in all manners, respects and particulars operated over the highways of the State of Texas in absolute conformity with all laws of the State of Texas appertaining to the operation of such character of trucks over the highways. Intervenor Finnegan says that under the terms of said contract and the rate to be paid him for said transportation services, he will earn and receive at least the sum of Three Thousand Five Hundred Dollars ($3,500.00), which said sum represents the actual profit accruing to said intervenor out of said contract after operating expenses and overhead are deducted and due allowance made for depreciation of his equipment; and intervenor Arnett says that under the terms of said contract and the rate to be paid him for said transportation services, he will earn and receive at least the sum of Six Thousand Dollars ($6,000.00), which said sum represents the actual profit accruing to said intervenor out of said contract after operating expenses and overhead are deducted and due allowance made for depreciation of his equipment, and intervenors desire to show that by reason of the matters and things hereinafter specifically set out, and more particularly if the enforcement of the Act of the Legislature herein complained of is not restrained, they will sustain a loss of several thousand dollars each that they would otherwise earn and collect under said contracts, and furthermore [fol. 74] will lose a substantial amount on the investment made as an incident to the proper carrying out of the terms and conditions of said contracts, amounting to several thousand dollars. That by reason thereof the matter in controversy in their said respective interventions, exclusive of interest and costs, exceed the sum of Three Thousand Dollars ($3,000.00), and arises under the Constitution of the United States of America and the Amendments thereto, all of which will be hereinafter more fully shown.

X

Intervenors here and now adopt, approve, ratify, reallege and confirm each and all of the allegations, matters

and things set forth and contained in Article VI of the original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

XI

Intervenors here and now adopt, approve, ratify, reallege and confirm each and all of the allegations, matters and things set forth and contained in Article VII of the original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

XII

Intervenors here and now adopt, approve, ratify, reallege and confirm each and all of the allegations, matters and things set forth and contained in Article VIII of the [fol. 75] original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

XIII

Intervenors here and now adopt, approve, ratify, reallege and confirm each and all of the allegations, matters and things set forth and contained in Article IX of the original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except the last paragraph of said Article IX and except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

In connection with said Article IX of the original bill of complaint herein, intervenor Finnegan would respectfully show to the Court: That the commodities he carries in his trucks over the highways of the State of Texas between the points heretofore set out fall entirely within the first

three classes as per classification made by the Railroad Commission. That on August 22, A. D. 1931, the effective date of the Act complained of herein, The Railroad Commission of Texas passed and promulgated its General Order No. 26, which said order, regulation and rule, reads in words and figures as follows, towit:

Whereas, Chapter 314 of the General Laws of the State of Texas, passed by the Forty-first Legislature, Regular Session, as amended by Chapter 24 of the General Laws of the Second Called Session thereof, having been further amended by Chapter 277 of the Acts of the Forty-second Legislature, Regular Session, by declaring all persons, firms, co-partnerships, corporations, companies, associations and joint stock associations, other than Contract Carriers, engaged in the transportation of property for compensation or hire over the highways of Texas, to be Motor Carriers.

And Whereas, said above-mentioned Acts imposed upon the Railroad Commission of Texas the duty to fix, prescribe or approve the rates and charges of such Motor [fol. 76] Carriers, as well as to fix, prescribe or approve just and reasonable rules and regulations to be observed by such Motor Carriers.

It is Therefore Ordered by the Railroad Commission that all Rates, Ratings, Rules and Regulations heretofore prescribed or approved by it for the government of the transportation of property by "Class "A" Motor Carriers" over the highways of Texas, be, and they are hereby, amended so to hereafter apply with equal force to "Motor Carriers," as hereinabove defined.

Effective 12:01 o'clock A. M., August 22, 1931.

Railroad Commission of Texas. C. V. Terrell, Chairman; Lon A. Smith, Pat M. Neff, Commissioners.

Attest: C. F. Petet, Secretary.

That under said above General Order No. 26, wherein the rates, ratings, rules and regulations theretofore prescribed and approved by said Railroad Commission of Texas for the government of the transportation of property by "Class "A" Motor Carriers" over the highways of the State of Texas were by express adoption made applicable to contract carriers, such as intervenors Finnegan, said

intervenor Finnegan, in assessing charges and rates for the transportation of said commodities between Houston and Dallas and between Houston, San Benito, McAllen and Brownsville, notwithstanding the rates definitely agreed upon and contracted for in his said contract, is subjected to and compelled under penalty of the law to abide by the following minimum rates: For first-class commodities to Dallas, $1.23 per hundred; to San Benito, $1.62 per hundred; to McAllen, $1.66 per hundred; and to Brownsville, $1.67 per hundred; for second-class commodities to Dallas, $1.05 per hundred; to San Benito, $1.38 per hundred; to McAllen, $1.41 per hundred; and to Brownsville, $1.42 per hundred; for third-class commodities to Dallas, $.86 per hundred; to San Benito, $1.13 per hundred; to McAllen, $1.16 per hundred; and to Brownsville, $1.17 per hundred. [fol. 77] That under the express provisions of this Act, intervenor Finnegan is bound by law to charge for said services of transportations rates not less than those heretofore set out, which are two and three times as much as the rates he is bound by under his said contract.

XIV

Intervenors allege that the provisions of said Act constitute an attempt on the part of the Legislature to convert intervenors, as private carriers, into common carriers and that through the several provisions of said Act complained of, the Legislature expressly undertakes to exercise the same control over intervenors as it does over common carriers, and that the Legislature has thereby subjected intervenors to all the duties and burdens now general and ordinary with the operation of motor trucks as common carriers, and that said Act empowers the Railroad Commission with substantially the same authority and right to govern and regulate the affairs of intervenors herein as it exercises over common carriers; that although the Legislature has in said Act, through Section 5 thereof, provided for the granting of a certificate of public convenience and necessity for common carriers, and, in Section 6 of said Act, provided that a "permit" be granted to contract carriers before either of said carriers be permitted to operate over the highways of the State of Texas, the rest and residue of said entire Act relate to contract carriers as well

as to common carriers, in that the remainder of said provisions are made applicable to "motor carrier", which, under the definition of motor carrier set out in subdivision (g) of Section 1 of said Act, includes contract carriers as well as common carriers. That, as has been heretofore pointed out, the permit required of contract carriers is practically nothing other than a different name for the "certificate of public convenience and necessity" required of common carriers. And intervenors here expressly [fol. 78] charge that all of said provisions in said entire Act, when considered together, plainly show that the Legislature is endeavoring in said Act to empower the Railroad Commission with authority to conduct and handle the affairs of a private carrier as a common carrier; that as a means to accomplish said end, the Railroad Commission, in Section 4, subdivision a, and Section 6-aa of said Act, has been empowered to not only regulate the rates said contract carriers can charge for their services and that the same can under no circumstances be less than that charged by common carriers for substantially the same service, but also has been authorized to prescribe the carriage of bonds and insurance policies and the amounts of same that must be given before intervenors, as private carriers, are entitled to a permit, and to require cargo insurance in such amounts as may be prescribed by said Commission (Section 13 of said Act); said Commission is further empowered to prescribe and pass upon the nature and character of the equipment to be used by said contract carriers and the amount and character of tonnage which may be hauled thereunder, and may fix the number and size of boxes, packages, barrels or bales of any particular commodity to be transported on any such vehicles of contract carriers and the method of loading such boxes, packages, etc., which said provision is contained in 13-a of said Act; said Commission is given the right in Section 13-b of said Act, and in said Act it is made the duty of said Commission to require intervenors, as contract carriers, to keep a set of accounts strictly in accordance with such classification of accounts and rules in respect thereto as may be established by the Commission, and to file reports and such other data as the Commission may deem necessary, and which said accounts shall be open to the inspection of the Commission or its representatives at all times; that by Section 11 of said Act,

intervenors, as contract carriers, even though they should make application for a permit and comply with said Act [fol. 79] in all things, are first subjected to a hearing before entitled to a permit, and the date of said hearing is set by the Commission and is to be at Austin, Texas—a distance of about one hundred seventy (170) miles from where the two herein named intervenors reside, and a much greater distance from where a great number of contract carriers reside,—and at which hearing the railroad Commission is authorized to reject intervenors' application for permit, if it feels that their services would impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory (Section 6-c); that contract carriers are likewise required to carry workmens compensation insurance for their employes, as is prescribed by Section 13 of said Act; that said Commission is, by Section 4-b of said Act, vested with power and authority, and it is expressly made its duty, to require that each driver of a motor truck owned or operated by a contract carrier shall have a driver's license, which said license shall be issued pursuant to an examination testing the ability and the fitness of applicant, conducted by the Commission, and other rules and regulations as the Commission may prescribe. That all of said provisions relate to contract carriers and common carriers alike, and that said provisions taken together are tantamount to compelling intervenors to dedicate their property to the quasi public use of public transportation, and results in a confiscation of their property without due process of law, in violation of the 14th Amendment to the United States Constitution.

XV

Intervenors further allege that the provisions of said Act are unconstitutional and void as to these intervenors in this:

[fol. 80] (a) Section 3 and Sub-Section (a) of Section 6 of said Act providing in substance that no motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall operate a motor vehicle over the highways of this state

until it shall have received a permit from the Railroad Commission of the State of Texas to engage in such business, and that the Commission shall not issue such permit until the applicant shall have in all things complied with the requirements of said Act, and Sub-section (c) of Section 6 of said Act providing in substance that no such permit shall be granted by the Commission to a contract carrier until after a hearing, nor shall any such permit then be granted if the Commission shall be of the opinion that the proposed operation of any contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory, is unconstitutional and void in this— Sub-section (2) of Section 4 empowers and makes it the duty of said Railroad Commission to supervise and regulate the transportation of property for compensation or hire by motor carriers (both common and contract) on any public highway and to fix, prescribe, or approve the maximum or minimum or maximum and minimum rates, fares and charges of said motor carriers; to prescribe rules and regulations for their operation; to require filing by them of monthly, annual and other reports and other data as the Commission may deem necessary, to supervise and regulate such carriers in all matters affecting the relation between them and the shipping public; that Sub-section (b) of Section 4 of said Act empowers and makes it the duty of the Commission to require of such carrier (common or contract) that each driver of a motor vehicle operated under the provisions of this Act, have a driver's license, which license shall be issued by said Commission [fol. 81] pursuant to an examination testing the ability and fitness of the applicant; Section 6aa, of said Act empowers and makes it the duty of the Commission to prescribe the minimum rates, fares and charges to be collected by a contract carrier in competition with a common carrier, which rates, fares and charges shall not be less than the rate prescribed by them for common carriers for substantially the same service; Section 11, of said Act provides that upon the filing of application for certificate by common carrier or permit by contract carrier that the Commission shall fix a time and place for hearing, after giving ten days' notice to the owners of all existing transportation facilities serving the territory applicant seeks to serve, as well as to

the Highway Commission, County Judge or Judges of the Counties and the Mayors of all incorporated cities or towns through which applicant seeks to operate; Sub-section (a) of Section 12, of said Act provides the rules and regulations governing the hearing on application for such certificate or permit and Sub-section (b) of Section 12 of said Act provides for the cancellation or revocation of such certificate or permit; Section 13 of said Act provides that before any such permit or certificate is granted to a motor carrier or before such motor carrier may lawfully operate under such permit or certificate, as the case may be, such motor carrier (common or contract) shall file with the Commission bonds and insurance policies not only to indemnify the public against personal injury and property damage, but to indemnify and insure the owner of the cargo being carried against loss or damage, without regard to the terms of the contract between the contract carrier and the owner of the cargo, and further provides that such motor carrier shall carry Workmen's Compensation insurance upon its employes; Section 13a, of said Act empowers and makes it the duty of the Commission to regulate, approve or disapprove the equipment to be used under any such permit or certificate, the amount and character of tonnage which may be hauled thereunder on any motor [fol. 82] vehicle, trailer, or semi-trailer, and to fix the number and sizes of boxes, packages, barrels and bales of any such commodity to be transported on any such vehicle, trailer, or semi-trailer under such permit or certificate, and the method of loading the same; Section 13b, of said Act authorizes and makes it the duty of the Commission to require all motor carriers (contract and common) to keep a set of accounts strictly in accordance with such classification of accounts and rules in respect thereto as may be established by the Commission, to file reports and such other data as the Commission may deem necessary which shall be open to inspection of the Commission and its representatives at all times; that Sub-sections (g) and (i) of Section 17, of said Act makes it unlawful for any motor carrier (Common or contract) or the owner of the certificate or permit or his agent, servant, or employe to give to any person any commission or other consideration to induce such person to deliver to such motor carrier property to be transported, or to give any rebate, or to

collect or receive from any person, firm, or corporation a less compensation for any services rendered, or to be rendered, than is prescribed for said services by said Railroad Commission; Section 22b of said Act being headed: "Declaration of Policy" declares that the business of operating motor carrier (common or contract) for hire along the highway to be affected with the public interest, and further declares that one of the purposes of the Act is that discrimination in rates charges may be eliminated. From the foregoing it is apparent that while the Act calls the license or certificate which it requires a private contract carrier to obtain from the Railroad Commission before it can lawfully operate motor vehicles upon the highway, a "permit," it is no more nor less than a "certificate of public convenience and necessity"; it is not a permit which interveners and other contract carriers may demand as a matter of right; there are several common carriers who have been authorized by the State of Texas to operate and are operating trucks over the highways and along the [fol. 83] same route covered by the respective intervenors herein who under the terms of said Act would have to be notified of interveners application for permit and if after a public hearing thereon, at which hearing said common carriers, the Highway Commission, all County Judges of the Counties, and all Mayors of the incorporated cities and towns through which interveners operate would be represented, the Railroad Commission was then of the opinion that to grant such permit to these intervenors would be detrimental to the business of the common carriers adequately serving said territory, then such permit would be refused, and in no event would such permit be granted unless intervenors first submit themselves to and comply with all the rules, regulations and requirements of said Act, in which Act the said Railroad Commission is explicitly vested with authority to control, regulate and supervise contract carriers, to fix and approve their rates and charges and regulate their services and to prescribe the method of keeping accounts, and, generally, to make rules governing their operation in the same manner and to the same extent as is provided for common carriers under such Act; that the aforesaid sections and sub-sections of said Act requiring these intervenors and other contract carriers to obtain a so-called permit before they can law-

fully operate their motor vehicles over the highways of this state in carrying out their aforesaid contracts, which permit will be issued only in the event said intervenors and other contract carriers submit themselves to each and all of the regulations provided for in said Act and comply in all respects with the terms of said Act, requires these intervenors and other contract carriers to dedicate their property to public use without compensation and is a taking of their property and property rights without due process of law, and it is an unwarranted and unreasonable and unnecessary regulation of their private business and is denying them equal protection of the law and is in contravention of the 14th Amendment to the Constitution of the United States.

[fol. 84] (b) Intervenors allege that the provisions of said Act making it unlawful for these intervenors as contract carriers to operate their motor vehicles upon the highways of this state without first having obtained a permit as provided by said Act and submitting themselves to and complying in all respects with the provisions of said Act is an unreasonable classification which is arbitrary and discriminatory as against these intervenors and other contract carriers operating motor vehicles over the highways of this state, in that there is no requirement that the large oil companies and other large corporations and business concerns and individuals of this state who operate hundreds of motor vehicles over the highways carrying their own commodities to obtain such permit or any other permit or any requirement that such persons and concerns comply with any provisions of said Act; that many of said persons, firms and corporations transporting their own commodities over the highways are operating trucks of the same kind and character being operated by these intervenors and transporting therein the same kind and character of commodities, and many of them loads of far greater weight; that the provisions of said Act requiring these intervenors to obtain a permit and submit themselves to all the inconvenience and unnecessary regulations of the Railroad Commission as provided therein, and not requiring persons, firms and corporations operating motor vehicles over the highways for transporting their own commodities, to obtain a permit and excluding said persons, firms and corporations and their motor

vehicles from all regulations of the Railroad Commission hereinabove set out as provided in said Act, arbitrarily, unjustly and unreasonably discriminates against these intervenors and other contract carriers, and arbitrarily and unreasonably designates and points out these intervenors and all other contract carriers as a class, and such provisions of said Act bears no relation to such classification or to the preservation of the highways or the safety of the public, [fol. 85] and for all of such reasons, is in contravention of the 14th Amendment to the Constitution of the United States, and is therefore void.

(c) That Sub-section (a) of Section 4 of said Act and Section 6aa of said Act and Sub-sections (g) and (i) of Section 17 of said Act empowering and making it the duty of the Railroad Commission to fix and prescribe or approve the maximum or minimum or maximum and minimum rates, fares, and charges to be charged the owner of the commodities transported by these intervenors and other contract carriers for the transportation of such commodities, which minimum rate shall in no event be less than that fixed by said Commission, prescribed for common carriers for substantially the same service and making it unlawful for these intervenors and other contract carriers to charge a less rate than that so fixed by the Commission, or to give anything of value to any shipper or consignee as a commission or consideration as an inducement to secure the transportation of such property or as a rebate, unjustly and unreasonably and arbitrarily discriminates against these intervenors and other contract carriers, similarly situated, and is an unreasonable and arbitrary interference and regulation of the private business of these intervenors and other contract carriers in which the public and all others except these intervenors and the respective parties with whom they have contracted have no interest; and the said provisions of said Act are an unreasonable and arbitrary designation and pointing out of these intervenors and other contract carriers as a class, and such legislation bears no relation to such classification or to the preservation of the highways or to the safety of the public thereon, and is a taking of these intervenors and other contract carriers' property and property rights without due process of law, and is in contravention of the 14th Amendment to the Constitution of the United States; and, further

that all commodities being transported by the intervenor Finnegan under the contract hereinabove mentioned are [fol. 86] commodities moving in interstate commerce, in that the same are being shipped by manufacturers and consignors in New York and adjoining states, which shipments are assembled at the Port of New York and transported by boat or by rail in car-load lots to Houston, and there loaded on trucks of intervenor Finnegan and transported to Dallas, Brownsville, San Benito and McAllen and delivered to the consignee to which said goods have — consigned; intervenor Finnegan alleges that the rates and charges prescribed by the Railroad Commission, which as hereinabove set forth is much greater than the said intervenor is obligated to transport said commodities at by virtue of the aforesaid contract, is an undue burden on interstate commerce and an attempt by the Legislature of the State of Texas, to regulate, control and fix the charges for interstate commerce and to impose an undue burden thereon, and is in contravention of the commerce clause of the United States Constitution and therefore void;

(d) The provisions of Sub-section (b) of Section 4 of said Act making it the duty of the Railroad Commission to require that each driver of a motor vehicle operated by these intervenors and other contract carriers similarly situated to have a drivers license, which license shall be issued by the Commission pursuant to an examination testing the ability and fitness of the applicant and under such rules and regulations as the Commission may prescribe, and the provisions of Section 6cc of said Act, making it unlawful for intervenors or any officer or agent of any contract carrier to require or knowingly permit any truck driver or helper to drive or operate a truck for a period longer than fourteen consecutive hours and further, regulating such drivers rest periods and the time which he shall be permitted to drive, arbitrarily, unjustly and unjustly discriminates against these intervenors and other contract carriers, in that by the terms of said Act persons, firms, and corporations owning their own trucks and transporting their own commodities regardless of the number of trucks thereon, the amount of commodities being transported or the character of em- [fol. 87] ployees operating their trucks are excepted from the provisions of said Act and are not so regulated with re-

spect to their drivers securing such license or with respect to the hours such drivers may operate their truck; that such Sections and Sub-sections of said Act are unreasonable, arbitrary and an unauthorized classification, designation and pointing out of these intervenors and other contract carriers, and that said purported legislation bears no relation whatever to such attempted classification and the same is unwarranted and in contravention of the 14th Amendment to the Constitution of the United States, and therefore void;

(e) That the provisions of Sub-sections (a), (c) and (d) of Section 4 of said Act wherein the Railroad Commission is imposed with the duty not only to prescribe and fix the rates to be charged by these intervenors and other contract carriers for transporting commodities, but likewise with the duty to supervise and regulate these intervenors and other contract carriers and their private business, in which the public has no interest, in all matters affecting the relationship between them and the shipping public, as well as to prescribe rules and regulations for the safety and operation of their motor vehicles and requiring them to file such monthly, annual or other reports and other data as the Commission may deem necessary, and to supervise and regulate these intervenors business and the business of other contract carriers in all matters, whether specifically mentioned in said Act, or not, unjustly, arbitrarily and unreasonably discriminates against these intervenors and other contract carriers in that by the terms of said Act all persons, firms and corporations owning and operating trucks for transportation over the highways of their own commodities regardless of the number and character of trucks being operated or the amount and character of the commodities being transported are excluded from the terms of said Act and are not subject to such regulations; that said provisions of such Act is an arbitrary, unwarranted and unreasonable pointing out and designation and classification of these intervenors and [fol. 88] other contract carriers for legislation and that said provisions of said Act bear no relation to such purported pointing our or classification and is an unwarranted and unreasonable regulation of these intervenors private business and the private business of other contract carriers in which the public has no interest and appropriation of property and property rights of these intervenors and other

contract carriers without compensation and due process of law, and is in contravention of the 14th Amendment of the Constitution of the United States, and therefore void.

(f) That Section 13a of said Act, empowering and making it the duty of the Railroad Commission to approve or disapprove the nature and character of equipment to be used by these intervenors and other contract carriers in transporting commodities over the highways and fixing the amount and character of tonnage to be hauled on any motor vehicle, trailer or semi-trailer used by them in fulfilling their private contract and to fix the number and sizes of boxes, packages, barrels or bales of any particular commodity to be transported on any such vehicle, trailer, or semi-trailer, and the method of loading such boxes, barrels or bales on such motor vehicle, trailer, and semi-trailer, unjustly, arbitrarily and unreasonably discriminates against these intervenors and other contract carriers similarly situated in that by the terms of said Act all persons, firms, and corporations owning and operating motor vehicles over the highways of this state, transporting their own commodities regardless of number or character of the motor vehicles operated by them and the amount or character of such commodities being transported are excluded from the terms of said Act and are not subject to such provisions and the regulations provided thereunder; that such is an attempted arbitrary designation and pointing out and classification of these intervenors and other contract carriers for legislation and is an unreasonable and unwarranted and an unnecessary and arbitrary regulation and interference with intervenors private business and the private business of other contract carriers in which the [fol. 89] public has no interest and said provisions of said Act bear no relation whatever to such purported classification, or to the preservation of the highway or the safety of the public thereon and is taking and appropriating property and the property rights of these intervenors and other contract carriers without due process of law, and is in contravention of the 14th Amendment to the Constitution of the United States and therefore void.

(g) That the provisions of Section 13 of said Act providing in substance that before any permit shall be issued

to these intervenors or other contract carriers to operate their motor vehicles as private contract carriers over the highways of this state that these intervenors and other contract carriers similarly situated must file with the Railroad Commission bonds and insurance policies issued by some insurance company to protect all persons against loss or damage or personal injury or loss or injury to property occasioned by the operation of said truck including the owner of the cargo being transported, arbitrarily, unjustly and unreasonably discriminates against these intervenors and other private contract carriers in that by the terms of said Act persons, firms and corporations operating their own motor trucks regardless of the character and number of trucks transporting their own commodities over the highways regardless of the amount or character of the commodity being transported are excluded from the provisions of said Section and no bond or insurance of any kind or character are required of them; that such purported legislation is an attempted arbitrary designation or classification of these intervenors and other contract carriers for legislation and that said provisions of said Act bear no relation whatever to said attempted or purported classification and is an unwarranted and unreasonable interference with these intervenors private business in which the public has no interest, as well as the private business of other contract carriers similarly situated and is a taking of the property of these intervenors and other contract carrier without due process of law, and is in contravention of [fol. 90] the 14th Amendment to the Constitution of the United States and therefore void.

That these intervenors would further show to the court that the respective contracts under which they are transporting commodities over the highways as private contract carriers hereinbefore referred to in detail do not require them to carry any kind or character of insurance or enter into any kind of bond for the protection of said party with whom they have contracted or any other person who has an interest in said commodities; that these intervenors and said other parties have entered into private contracts, whereby these intervenors will carry and transport such commodities as a private contract carrier and the public has no interest whatsoever in such contract or any interest in whether or not these intervenors carry insurance or

execute a bond to protect such other parties against loss or injury to the property being transported, and had such other desired such protection he would have required it by the terms of said contract; that such requirement is in contravention to that part of the 14th Amendment to the Constitution of the United States which protects these intervenors and other persons similarly situated from interference in their right of private contract.

Intervenor Finnegan further says that the commodities which he is transporting under contract as hereinabove alleged are moving in interstate commerce and the requirement that he carry insurance or bond with some insurance company for the protection of the owners of said commodities and all parties interested therein against loss or injury to said commodities being transported when he is not required to do so by such contract creates an undue burden upon interstate commerce and the provisions of said Act requiring said insurance and bond is an unwarranted legislation of the State of Texas creating an undue [fol. 91] burden upon interstate commerce in contravention of the commerce clause of the United States Constitution and therefore void.

(h) That the various provisions of said Act as hereinabove set out is a scheme for regulating, supervising and controlling the business of these intervenors and other contract carriers in which they and the other party to their contracts only are interested, and in which the public has no interest, in the same manner and to the same extent that such Act provides for the regulation, control and governing of the business of common carriers and that practically the only distinction made in said Act between common carriers and private contract carriers similar to these interveners is the requirement that contract carriers shall obtain a "permit" before operating their motor vehicle upon the highways—while common carriers are required to obtain a "certificate of public convenience and necessity", but the substance and effect of the provisions of said Act relating to the securing of the "permit" and the method and manner of hearing and the notice to be given to competing common carriers, County Judges and Mayors of the Counties and Cities through which the applicant proposes to operate, and the conditions under which such permit is

granted shows that said "permit" is nothing more or less than a "certificate of public convenience and necessity", that otherwise said Act controls, regulates and authorizes the Railroad Commission to control, supervise and regulate the business of these intervenors and other private contract carriers' in the same manner and to the same extent as it does common carriers; that said Railroad Commission is explicitly vested with authority to supervise every motor carrier for hire (common or contract) to fix or approve its rates and charges and regulate its service, prescribe its method of keeping accounts and generally to make rules governing its operation; that such a scheme of [fol. 92] regulation of the business of a private carrier, such as these intervenors, is manifestly beyond the power of the state and is an unwarranted and arbitrary and unnecessary regulation of these intervenors and other private contract carriers' business, and is appropriating these intervenors and other contract carriers' business, property and property rights to public use without just compensation, and without due process of law, in contravention of the 14th Amendment to the Constitution of the United States.

(g) The provisions of said Act requiring these intervenors and other contract carriers to obtain a permit and submit themselves to and comply with all the provisions of said Act before they may lawfully operate motor vehicles over said highways as contract carriers unreasonably and arbitrarily discriminates against these intervenors and other contract carriers other than those engaged in or who desire to engage in transporting for hire live stock, mohair, wool, milk, live stock, feed stuffs, household goods, oil-field equipment, timber when in its natural state, farm machinery, and grain, in that Sub-section (d) of Section 6 of said Act authorizes and empowers the Railroad Commission of the State of Texas to issue permits upon application to those persons who desire to engage in the business of transporting for hire over the highways of this state live stock, mohair, wool, milk, live stock, feed stuffs, house-hold goods, oil-field equipment, timber when in its natural state, farm machinery and grain, special permits on such terms, conditions and restrictions as the Railroad Commission may deem proper; that intervenors are not engaged in the

transporting of any of such excepted commodities; that in excepting from the provisions of said Act contract carriers who engage in transporting the aforementioned excepted commodities and authorizing and empowering the Railroad Commission to grant persons engaged in transporting such [fol. 93] commodities special permits on such terms and conditions as the Railroad Commission may deem proper, while requiring these intervenors and other contract carriers not engaged in transporting such commodities to submit themselves to, and comply with each and all of the terms and provisions of this Act unjustly and unreasonably discriminates against these intervenors and such other contract carriers, and in favor of such contract carriers who are engaged or desire to engage in transporting the aforementioned commodities and is in contravention of the 14th Amendment of the Constitution of the United States.

XVI

Intervenors here and now adopt, approve, ratify, re-allege and confirm each and all of the allegations, matters and things set forth and contained in Article XII of the original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

Intervenors further say that the allegations of Article XII of said original bill of complaint are equally as applicable to them as to complainant.

Wherefore, premises considered, intervenors pray the court to make and cause to be entered an order permitting them to file this, their bill of intervention, and to associate themselves with the complainant herein as complaint-intervenors; that they be permitted to maintain and prosecute this suit to a full and final effect in conjunction with and association with the original complainant herein, and especially pray for all the relief prayed for and referred to [fol. 94] in complainant's original bill of complaint herein; that the respondents herein be required to answer this petition of intervention; and that upon hearing of this cause, said Act, in so far as the same relates to inter-

venors' right to transport commodities as private carriers over the highways of the State of Texas, in pursuit and fulfillment of their respective said contracts, be declared invalid; that respondents and each of them, their successors, deputies, and employes, and those under their control, as well as all other Peace Officers of the State of Texas, and any subdivision thereof, whose duty it is to make arrests for the violation of the Act complained of herein, and all officers of the State and any subdivision thereof whose duty it is to prosecute complaints filed for the violation of the Act complained of, be perpetually enjoined from molesting, arresting, filing complaints or charges against, or prosecuting intervenors or any of their employes, for violation of said Act in the operation of their motor trucks and transportation of commodities as hereinabove set out, and from taking any steps toward molesting or arresting, or filing charges or complaints against, intervenors, their agents, servants or employes, for failure to comply with said Act and each of the respective sections thereof.

Intervenors pray that in order to prevent irreparable injury to them and to fully protect them in the pursuit of their business during the pendency of this suit, this Honorable Court immediately issue a temporary injunction, enjoining and restraining said respondents, their successors, deputies and employes, and all other persons charged under the laws of the State of Texas with the enforcement of said Act, known as House Bill No. 335, and that respondents and each of them, and all of their respective officers, agents, appointees, employees, servants and repre-
[fol. 95] sentatives, the *the* State Highway Patrol Officers, or their successors in office, and all other persons charged under the laws of the State of Texas with the enforcement of said Act, be temporarily restrained from doing any and all things purporting to be authorized and warranted by said Act, in so far as the same relates to intervenors, and that said temporary restraining order may remain in force until the time of the hearing and determination of intervenors' application herein made, for a preliminary injunction enjoining the respondents as herein prayed for, and intervenors hereby apply for preliminary injunction and pray that same be granted against each and all of said respondents, their employees, agents and representatives

or successors in office, and intervenors pray that upon final hearing said injunction may be made perpetual and perman-t and the provisions of said Act herein complained of be held to be in conflict with and contrary to the Constitution of the United States, and that said Act be declared void as depriving intervenors of their property without due process of law and as depriving intervenors of the equal protection of the laws.

Intervenors further pray that they be granted such other and further relief, in law or in equity, as they may be entitled to, and that they recover from respondents all costs herein expended, for all of which they will ever pray.

Fulbright, Crooker & Freeman, Franklin & Blankenbecker, Attorneys for Intervenors.

[fol. 96] *Duly sworn to by W. S. Finnegan and P. E. Arnett. Jurats omitted in printing.*

[fol. 97] [File endorsement omitted.]

[fol. 98] In United States District Court

[Title omitted]

Order Calling for Assistance of Hon. Duval West, U. S. District Judge, in Place and Stead of Hon. Randolph Bryant—Filed September 2, 1931

The Honorable Randolph Bryant, Judge of the Eastern District of Texas, being unable to attend and participate in the hearing of the above cause, I call to my aid, in accordance with the law, and in the place and stead of Judge Bryant, the Honorable Duval West, United States District Judge of the Western District of Texas.

Houston, Texas, September 2, 1931.

T. M. Kennerly, United States District Judge.

[File endorsement omitted.]

[fol. 99] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RESPONDENTS TO BILL OF COMPLAINT—Filed Sept. 3, 1931

Now come T. Binford, O'Brien Stevens, R. J. Martin, Albert Hausser, D. R. Davis, Cone Johnson, W. R. Ely, D. K. Martin, L. G. Phares, Hon. R. S. Sterling, Hon. James V. Allred, C. V. Terrell, Lon A. Smith and Pat M. Neff, Respondents in the above styled and numbered cause, and, for answer to the complaint herein filed, represents and alleges:

I

Respondents admit all of the allegations in Paragraph I of the Original Bill of Complaint.

II

Respondents say that they have no information or knowledge of any contract, either verbal or written, now or heretofore existing between the Complainant and the Southwest Freight Company, Inc., nor did they have any means of informing themselves of the letter alleged to have been [fol. 100] written to the Complainant herein by said Southwest Freight Company, Inc., under date of March 2nd, 1931, nor did they have any information concerning whether or not this ex parte instrument evidenced a written contract or agreement between the Complainant herein and the said Southwest Freight Company, Inc.

III

Respondents say that they have no knowledge or information of the time when Complainant began operating trucks over the highways of the State of Texas, nor do they have any knowledge or information of the reason why Complainant began operation over the highways of Texas, nor do they have any knowledge or information as to whether or not said operation of said trucks over the highways of Texas was in pursuance of any obligation, contract or agreement heretofore or now existing by and between the Complainant and Southwest Freight Company, Inc. Respond-

ents further say that they have no knowledge or information as to whether or not the pursuance of the alleged obligations and duties imposed by the verbal or written contract referred to in Complainant's Bill resulted in Com-
[fol. 101] plainant's acquiring more or new or other equipment in order to carry out the terms of the said alleged contract. Respondents say that they have no knowledge of the length, term or duration of the said alleged contract, if such contract does exist, nor whether the same is in force at this time, nor whether the same is a valid subsisting and existing contract, nor if the same be a valid and existing contract what time the said contract would expire. Respondents further say that they have no knowledge or information as to how or for whom Complainant operates his trucks or transports commodities over the highways of the State of Texas, nor what commodities Complainant hauls over the highways of Texas, nor what contracts he may have entered into. Respondents say that since they have no knowledge of the method or manner of the operations of Complainant, they are not informed as to whether the operation has been such that he has not become a common carrier.

IV

Respondents say that they are not informed as to what additional or other equipment Complainant has acquired since the alleged date of the alleged contract. Respondents further say that they are not informed as to whether or not said additional equipment or any other equipment oper-
[fol. 102] ated by Complainant was in pursuance and in accordance with all the laws of the State of Texas and with all such requirements of the State of Texas relating to the operation of trucks on the highways of the State; nor are they informed as to whether said trucks were legally licensed; nor as to whether or not they were and have been at all times operated over the highways of the State of Texas in conformity with all of the laws of the State of Texas, pertaining to the operation of such trucks over the highways. Respondents say that they are not informed as to what commodities nor in what quantities the Complainant has transported freight in accordance with the alleged agreement, nor are they informed as to the rate or charge which was made or agreed to be paid for the movement of such freight; nor are they informed as to the al-

leged speculative earnings which would accrue from the fulfillment of the alleged contract; nor are they informed as to what the alleged and highly speculative actual profits would be from the performance of the alleged contract after the payment of operating expenses and overhead in performing said alleged contract. Respondents specially deny that if the terms and provisions of the Act of the [fol. 103] Legislature herein complained of are enforced that they will sustain a loss of several thousand dollars or that Complainants would sustain any loss whatsoever. Respondents specially deny that Complainant would lose a substantial amount of money on the investment made as an incident to the carrying out of the terms of the alleged contract, and specially deny that the Complainant would lose any sum of money by reason of said investment. Respondents specially deny that the sum of Three Thousand and no/100 ($3,000.00) Dollars or any other actual sum capable of being proven is involved in this suit or in this controversy in any way whatsoever.

V

Respondents say that they are not informed as to the dispatch with which Complainant has made the delivery of freight under the alleged contract moving in the service of Southwest Freight Company, Inc.; nor the manner, time and speed with which such freight was loaded on his trucks at the docks of the steamship companies at Houston, Texas; nor the time within which it was delivered to San Antonio, Texas; nor are Respondents informed as to whether or not Complainants' actions, conduct and performance of the terms of the alleged contract has been at all times within [fol. 104] the terms of the agreement, if it existed; nor whether or not Complainant has furnished an overnight service between the cities of Houston and San Antonio. Respondents further say that they are not informed as to whether or not the Complainant has performed the terms of the alleged contract, if such existed, and were performed in such a way as to satisfy the said Southwest Freight Company, Inc. Respondents further say that they have no information as to whether or not the trucks of Complainant have been operated in such a way that no accidents of any kind or character have occurred while engaged in transporting property over the highways of the State of Texas.

VI

Respondents specially deny that the Legislature of the State of Texas has passed any law which would prevent or prohibit Complainant from pursuing and carrying out the terms, provisions and conditions of the contract, as alleged, if in fact such contract existed, and specially deny that what is commonly known and referred to as House Bill No. 335, which became effective as the law of the State of Texas, on August 22nd, 1931, would prevent and prohibit [fol. 105] Complainant from carrying out the terms, conditions or provisions of any alleged contract which the Complainant may have. Respondents specially deny that the enforcement of the provisions of the said Act, commonly known as House Bill 335, would result in Complainant's being arrested and deprived of any sum of money, or being deprived of earning any sum of money under and by virtue of the contract, as alleged in Complainant's Bill, or any other contract, or that the enforcement of the provisions of the said Act would result in loss to the Complainant by reason of any investment which Complainant may have made in equipment used in operating under the alleged contract or any other contract. Respondents specially deny that the said alleged equipment of the Complainant cannot be profitably used by Complainant for other and lawful purposes within this State. Respondents specially deny that there would be many other firms, corporations and persons of the State of Texas that would have equipment that could not be profitably operated over the highways, and they specially deny that the enforcement of this Act would result in the dumping of a large amount of equipment on the market for sale and would bring about an extremely low market value for trucks and equipment, or that the enforcement of the provisions of this Act will [fol. 106] result in the depreciation of value of such equipment. Respondents specially deny that the enforcement of the provisions of said Act will mean the destruction of Complainant's business, and they further specially deny Complainant will suffer any injury, irreparable in nature, or that Complainant will suffer any injury whatsoever. Respondents admit that the Legislature of Texas enacted and that the Governor of Texas approved what is commonly known as House Bill No. 335 and that the same

became effective as a law of the State of Texas on the 22nd day of August, A. D. 1931, and the Respondents admit the terms, provisions, conditions, liabilities and penalties of said Act of the Legislature, found in Complainant's Original Bill of Complaint verbatim on Pages 9 to 23, inclusive.

VII

Respondents admit that Complainant would be required to conduct the operation of his trucks under the terms and provisions of the law of this State, and that a failure to so conduct the operation of his trucks over the highways of this State would subject the Complainant, his agents, servants and employees to prosecution for a violation of the laws of the State of Texas. Respondents specially [fol. 107] deny, however, that the penalties provided by the law are unusually severe or heavy or that the punishment provided is in any way excessive. Respondents admit under the provisions of the law that on and after August 22nd, 1931, it would be unlawful for complainant to operate his trucks over the highways of the State of Texas or to transport property over the highways of the State of Texas without having obtained a permit from the Railroad Commission to engage in such business. Respondents also admit that the Complainant would be required under the terms of the Act, as more fully appears from the provisions of the law as fully set out in Complainant's Original Bill of Complaint, to make an application in writing for a permit to the Railroad Commission, which application must be written, setting forth certain facts, including all facts concerning the financial condition of Complainant, as well as facts as relate to his physical properties, and the nature of the transportation in which Complainant wishes to engage and also stating substantially the territory to be covered by the operation, together with other information. Respondents further admit that after such application is made to the Railroad Commission of the State of Texas that the law requires a public hearing to be held upon such application, the nature of which is to show the necessity [fol. 108] for the granting of a permit as a contract carrier, which permit may be granted or withheld by the Railroad Commission of the State of Texas, in accordance with the facts as they are or may be developed at such hearing.

Respondents deny that such permit is in truth or in fact a certificate of public convenience and necessity within the usual and customary meaning of the phrase, and Respondents further specially deny that the term "a permit" as used in the Act is in any way synonymous with the term certificate of public convenience and necessity, as applied to a common carrier for hire. Respondents specially deny that Complainant's business is unaffected with a public interest, and Respondents specially deny that such regulation or the requirement for obtaining such a permit is in contravention of the Fourteenth Amendment to the Constitution of the United States. Respondents say that they have no information as to whether or not any of the trucks operated by Complainant are operated as Class B carriers within the meaning of the definition of the Class B carriers under the Acts of 1929, Forty-first Legislature, Page 698, Chapter 314, and that they have no information as to whether Complainant has heretofore been operating as a common carrier or as a contract or private carrier of goods over the highways of this State.

[fol. 109]

VIII

Respondents say that they are not informed as to whether or not Complainant would be permitted to operate over the highways of this State if he complies with all of the requirements of the Act in question, as they have no means of information, and such allegations can amount to nothing more than an unjustified conclusion. Respondents admit, however, that Complainant would be required, under the provisions of the law, to obtain a permit from the Railroad Commission of Texas before further operating after the 21st day of August, and that to obtain such permit requires a public hearing and that notice of the filing of Complainant's application and the time and place of such hearing would be required to be given not less than ten days before such hearing and that such notice would be required to be addressed to the owner or owners of existing transportation facilities serving the same territory which the applicant would seek to serve, as well as to the State Highway Commission, as well as to the County Judge or Judges of the counties and to the mayor of any incorporated city or town through which such carrier would seek to operate.

Respondents say that they are not informed as to whether a compliance with the provisions of this Act would result [fol. 110] in a breach of any existing contract; nor whether or not Complainant would lose any substantial right by reason of the provisions of this Act. Respondents specially deny that the Complainant would lose any valuable right or interest or that he would be deprived of engaging in any legitimate business or that he would suffer or lose any sum of money. Respondents specially deny that the regulations provided in this Act amounts to a destruction of a legitimate business in which Complainant is now engaged and that the terms, provisions, conditions and penalties of the Act are unjust, arbitrary or without lawful basis, or that there is anything in said Act in contravention of or offensive to the Constitution of the United States. Respondents say that they are not informed as to what is necessary for the Complainant to do in order to operate over the highways of the State of Texas in compliance with any alleged contract existing by and between the Complainant and Southwest Freight Company, Inc.

Respondents further say that they are not informed as to what ships of the Morgan Line or the Southern Steamship Line dock at Houston each week, nor as to what freight is delivered from such ships as may come into Houston over these lines may be delivered to Complainant herein for transportation for the benefit of the Southwest Freight [fol. 111] Company, Inc.; nor are they informed as to what trucks it is necessary to operate; nor when it is necessary to operate them in the handling of the freight movement for the Southwest Freight Company, Inc. Respondents say they are not informed as to whether or not Complainant has promptly and immediately handled all of the merchandise of the said Southwest Freight Company, Inc., nor whether or not they have promptly picked up the merchandise at the docks at Houston and promptly delivered the same at San Antonio. Respondents further say that they are not informed as to the effect of any such suspension of such service for any period of time; nor whether or not such suspension would be necessary. Respondents further say that they are not informed as to whether or not any interruption of the freight movement by Complainant, as alleged by him to be necessary under the terms of

the provisions of an alleged contract with Southwest Freight Lines, Inc., would result in the cancellation of the alleged contract.

IX

Respondents admit that under the provisions of the Act complained of the Railroad Commission of Texas is vested with power and authority, and it is made its duty to prescribe minimum rates, fares and charges to be collected by all contract carriers, and that under the provisions of the [fol. 112] Act the Railroad Commission of Texas must prescribe a rate to be charged by contract carriers and that under the provisions of the Act such rate may not be less than that prescribed for common carriers for substantially the same service. Respondents admit all of the other allegations in Paragraph IX of Complainant's Original Bill of Complaint, relating to the requirements of the Act itself, but say that the Act itself is the best evidence of what it requires and prefer that this Court should consider and rely upon the terms and provisions of the law itself as *it* its requirements. Respondents deny that Complainant can no longer operate under private contracts with such parties as he may care to contract with. Respondents say that they are not informed as to what rate Complainant has been receiving for transporting freight for Southwest Freight Company, Inc., nor of the kind or character of the commodities carried. Respondents further say that they are not informed as to the classification of commodities carried by Complainant would take under the classifications fixed by the Railroad Commission of Texas for determining rates. Respondents say that they are not informed as to what rates the Railroad Commission will fix, [fol. 113] but, on the other hand, affirmatively allege that rates are at all times subject to change by the Railroad Commission, either upon their own initiative or upon the application of those affected thereby. Respondents say that they are not informed as to what rates the Railroad Commission of Texas will fix for the transportation of commodities falling within the first, second, third and fourth classes, or in the special commodity class, between the cities of Houston and San Antonio, and that the allegation of such by Complainant is purely conjectural and speculative.

Respondents specially deny that Complainant would be required after the effective date of the Act in question to charge the rates set out by the Complainant in his Original Bill, but admit that Complainant would be required to charge as a minimum rates fixed and to be fixed by the Railroad Commission of Texas. Respondents further say that they are not informed as to the class of merchandise which Complainant alleges that he transports over the highways of the State for Southwest Fr*egith* Company, Inc. Respondents specially deny that there is anything in the requirements of the said House Bill No. 335 which would operate as a deprivation of Complainant's property without due process of law, or that there is anything is said Act which is violative of the Fourteenth Amendment [fol. 114] to the Constitution of the United States, and Respondents further specially deny that there is anything in any provisions of this Act which violates any of the provisions of Section 10 of Article 1 of the United States. Respondents further specially deny that the movement of freight between Houston and San Antonio by Complainant for the benefit of Southwest Freight Company, Inc., constitutes an interstate shipment or that any part of said shipment constitutes an interstate shipment, but that all of such movements have been and are intrastate shipments.

X

Respondents specially deny the allegations in Paragraph X of the Original Bill of Complaint and say that this Act is not an attempt on the part of the Legislature to convert any private carrier into a common carrier and avers that the Act itself does not convert any private carrier into a common carrier. Respondents admit the allegations of Paragraph X of Complainant's Original Bill of Complaint so far as they relate to what the Act requires, but say that the Act itself has been set out in full in Complainant's Original Bill, and Respondents say that the Bill itself will be the best evidence of its requirements, and prefer that the Court consider the Bill itself as to what it requires [fol. 115] rather than the allegations of Complainant as found in said Paragraph X. Respondents specially deny that the provisions and requirements of the Act, when taken together and considered as a whole, amount to a dedication

of Complainant's property to a public use or that when so regulated said property is subject to a public use, and Respondents specially deny that the provisions and requirements that *the provisions and requirements that* this Bill result in the confiscation of Complainant's property without just compensation or that it deprives him of his property without due process of law, or that the provisions of the law violate any provision or section of the Constitution of the United States or any other amendment, section or condition of the Constitution of the United States.

XI

Respondents admit the allegations in Paragraph XI of Complainant's Original Bill in that the Act in question does require that a contract carrier would be required to take out workmen's compensation insurance, or at least, such is the requirement where such contract carrier employs three or more persons, but the Respondents specially deny that if Complainant complies with the provisions of the Bill that Complainant would be subject to [fol. 116] arrest or prosecution, or that he would be subject to penalties for transporting property over the highways of this State, or that the Complainant would suffer great and irreparable injury and damage, but admits that if Complainant should pursue his avowed intention of not complying with the provisions of this law that Complainant would make himself liable to arrest and prosecution the same as he would for disobedience of any other criminal laws of this State. Respondents specially deny that the requirement for workmen's compensation insurance is unjust, unreasonable or discriminatory or that such requirement deprives Complainant of his property without due process of law and without the equal protection of the law or that this provision is in any way in contravention of the Constitution of the United States. Respondents admit the allegations in Paragraph XI, as found beginning with the first paragraph on Page 35 of Complainant's Original Bill, as to what the provisions of the Act under consideration requires, but again Respondents say that they prefer that the Act itself as it is set out in Com-

plainant's Original Bill is the best evidence of what the Bill requires and should stand for, and, in this connection [fol. 117] Respondents say that this Court should consider the Act and the provisions of the Act itself as to what they do require rather than Complainant's allegations in this respect, but in this connection Respondents specially deny that there is any unjust or unreasonably, arbitrary discrimination between Complainant or between contract carriers and other persons operating trucks and transporting property over the highways of the State of Texas, and Respondents specially deny that the regulation by the Railroad Commission of Texas of the number of boxes, packages, barrels and bales that may be hauled by a contract carrier, or that the requirement that a driver should not be permitted to drive a truck for a longer period than fourteen consecutive hours without at least eight consecutive hours off duty, or that the requirement as to a driver's license, or other requirements, denies to the Complainant the equal protection of the law and is a violation of the Fourteenth Amendment to the Constitution of the United States.

XII

Respondents say that they are not informed as to whether or not it is necessary for Complainant to transport property over the highways of the State of Texas; nor are they informed as to any contract which Complainant says exists [fol. 118] between himself and any other person, firm or corporation; nor are they informed as to what is necessary to fulfill the terms and provisions of the contract, if such contract does in fact exist. Respondents specially deny that if Complainant complies with the provisions of the Act under consideration or that compliance would operate in an unjust manner to Complainant, or that it would deprive Complainant of any constitutional right or that such compliance would bring about a destruction of Complainant's business or a deprivation of his property without due process of law. Respondents admit that the failure or refusal of Complainant to comply with the provisions of the Act would undoubtedly result in Complainant, his agents, servants or employees being arrested and prosecuted for a violation of the provisions of the Act. Respondents, however, specially deny that a compliance with the

law will cause any interruption or destruction of the business of Complainant or that it will bring about a cancellation of any alleged contract now existing in favor of Complainant for the transportation of property over the highways of this State. Respondents say that they are not informed of any threatened arrest or prosecution for failure to comply with the provisions of this Act as to this [fol. 119] Complainant, but say that it is the duty of the Respondents herein to exact obedience to all of the laws of the State of Texas and that said Respondents, and each of them, would and will perform, to the extent of their ability, all of the duties and obligations imposed upon them by the laws and constitution of this State. Respondents specially deny, however, that the enforcement of the provisions of the Act under consideration would force and compel Complainant to abandon his business. Respondents specially deny that the allegation that Complainant has no adequate remedy at law, and they also specially deny that Complainant would suffer irreparable injury, damage or loss.

[fol. 120] Further come the respondents herein and by way of affirmative pleading, respectfully show to the Court as follows:

1

Respondents affirmatively show that upon the pleading of complainants themselves in this case the complainants are shown to be common carriers and for this reason they have no legal right to be heard to complain with regard to any restrictions that might be enforced against contract carriers by virtue of the terms of House Bill 335, the bill complained of.

2

If respondents are mistaken in their contention that under the terms of the pleadings of complainants themselves said complainants are common carriers as above referred to, then respondents further affirmatively plead in this case as follows:

(1) Contract carriers under the terms of said act complained of are not required to become common carriers, nor are contract carriers under the provisions of said Act

required to assume the characteristics or obligations of a common carrier and respondents show to the Court that contract carriers and common carriers are dealt with separately and distinctly, different obligations and duties imposed upon each under the provisions of said act and, in this connection show to the Court that the requisities for an application for and the showing to be made thereon are distinctly different in the one case for securing a certificate of convenience and necessity by a common carrier and in the other case securing a permit by a contract carrier. That a common carrier must prove convenience and necessity in order to secure a certificate and that the contract carrier does not have to prove convenience and necessity but merely has to prove that the efficient public service of common carriers serving the territory involved will not be impaired by its operation. Similarly, other numerous pro- [fol. 121] visions of said Act impose definite and different duties upon common carriers and contract carriers and give the Railroad Commission of Texas definite powers with respect to each down to and including the fixing of rates in respect of which the Railroad Commission is empowered to fix both the maximum and minimum rate for common carriers but is limited to the fixing of minimum rates only for contract carriers. By reason of the facts above alleged a contract carrier under the terms of said Act is not required to become a common carrier nor is he, either in substance or form, made a common carrier.

3

Respondents further affirmatively show that during the past few years there has arisen between the common carrier trucks and the contract carrier trucks a form of uneconomical, cutthroat competition that, instead of serving the best interests of the general shipping public, is detrimental to the best interests of the general shipping public and that for the purpose of protecting the shipping public in general, both with regard to the class of service to be received by said shipping public and with regard to the rates to be paid by such shipping public, it is necessary that regulations of the kind included in House Bill 335 be enacted and enforced. Respondents affirmatively show that unless such regulations are properly enforced, the general shipping public will suffer, the shippers will not be served

and, in the long run, it will not be enabled to receive reasonable service at a reasonable cost.

4

With special reference to the provisions of House Bill 335 authorizing the fixing of a minimum rate for contract carriers, the respondents affirmatively show that such contract carriers use the public highways and that for this and other reasons, their business and their operation and the rates charged by them are matters affected with the public interest and that for this reason and the reasons herein-[fol. 122] above more specifically set out, the regulation of such contract carriers and the prescribing of minimum rates to be charged by them is a proper exercise of the police power of the State of Texas.

Wherefore respondents pray that the relief asked for by complainants herein be in all things denied and that the temporary injunction prayed for be denied and that the Act in question be in all things sustained and held valid; and that they be granted such other and further relief at law and in equity to which they may be entitled, and that they recover from the complainants all costs herein expended.

James V. Allred, James V. Allred, Attorney General of Texas; T. S. Christopher, T. S. Christopher, Assistant Attorney General; Elbert Hooper, Elbert Hooper, Assistant Attorney General, Solicitors for the Respondents. W. L. Cook, Albert Reed, of Counsel.

Duly sworn to by T. S. Christopher. Jurat omitted in printing.

[fol. 123] [File endorsement omitted.]

[fol. 124] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RESPONDENTS TO INTERVENTION OF D. A. BEARD—Filed Sept. 3, 1931

Come now Respondents in the above styled and numbered cause, to-wit, T. Binford, O'Brien Stevens, R. J. Martin,

Cone Johnson, W. R. Ely, D. K. Martin, L. G. Phares, R. S. Sterling, James V. Allred, C. V. Terrell, Lon A. Smith and Pat M. Neff, and answering the intervention of D. A. Beard, show unto the Court as follows:

I

Respondents admit the allegations contained in Paragraphs 1 and 2 of Intervener's intervention.

II

Answering Paragraph 3 of the intervention, Respondents say that they are not informed as to the amount in controversy, but Respondents admit the other allegations contained in said Paragraph 3.

III

Answering Paragraph 4 of said intervention, Respondents say that they are not informed as to the contracts, oral or otherwise, which Intervener has with Peden Company, but Respondents say that as alleged by Intervener [fol. 125] no valid contract exists between Intervener and Peden Company, because there is no consideration for said contract alleged and because there is no mutuality thereto, and for the further reason that said contract is too indefinite and uncertain as to its terms to be capable of enforcement. In this connection, Respondents say that if in fact any contract does exist between Peden Company and this Intervener, which contract may be affected by any matters complained of, that said contract, in so far as it affects rates of carriers, is affected with a public interest. Respondents say that they are not informed as to the investment or number of vehicles owned or possessed by Intervener or used by him. Respondents say that they are not informed as to the effective period of Intervener's contract, if in fact he has such a contract, but Respondents say that, as alleged, said contract is invalid by reason of the fact that it is indefinite as to its terms so as not to be capable of enforcement. Respondents are not informed as to the manner in which Intervener has performed service for Peden Company, nor as to the rate of return to him for such service, nor as to the amount of merchandise trans-

ported nor the compensation therefor; nor are Respondents informed as to said Company's desire to continue such relations nor as to the desire of continuing any arrangements that Intervener may have in the future, nor as to how long Intervener will transport property for said Company under any circumstances whatsoever; nor are Respondents informed as to what the relations are now between Intervener and said Company, nor as to any changes which might be made in the future by said parties, nor as to what rates may be agreed upon by them.

[fol. 126] IV

Answering Paragraph 5 of said intervention, Respondents say that they are not informed as to what the rates of transportation made by Intervener with Peden Company were or whether or not they were lower than common carriers', truck or railroad carriers', or whether his agreed rates of compensation now are substantially below same. Respondents further say that they are not informed as to whether or not Intervener is a common carrier, but again Respondents allege that no valid contract has been alleged herein between Intervener and Peden Company.

V

Answering Paragraph 6 of said intervention Respondents say that they are not informed as to whether or not Intervener applied for or has obtained what is known as a "Class B Permit" from the Railroad Commission of Texas, but in this connection, Respondents say that if in fact Intervener does have and possess a Class B Permit, as he alleges, that it was necessary for him to represent to the Railroad Commission of Texas that he was a common carrier and that he did so represent in filling out his application for said permit.

Respondents are not informed as to how Intervener proceeded to carry out any contract which he may have had, if any, with Peden Company, nor the rates which he charged, nor are Respondents informed as to the amount Intervener has received for said service, nor what sums of money he may receive in the future.

[fol. 127] VI

Answering Paragraph 7 of said intervention, Respondents say that they are not informed as to what operations may be necessary by Intervener to fulfill the needs of the Peden Company, but Respondents deny that there is any necessity for any suspension of operations by Intervener, and Respondents allege that by the provisions of the Act complained of, a method is provided by which Intervener may secure a permit under said new Act, and it is further provided that Intervener, or persons holding Class B certificates under the former law, would be permitted to continue operations for a period of thirty days and as much longer thereafter as might be necessary for the Commission to determine the application; and Respondents further deny that Intervener would be liable for a breach of his contract or for damages thereafter, if in fact his agreement is as alleged, for the reason that Intervener has not alleged any valid contract.

Respondents say that they are not informed as to how Intervener's trucks are equipped, or whether they are operated in accordance with the laws of the State, or whether they are duly licensed in conformity therewith.

VII

Answering Paragraph 8 of said intervention, Respondents deny that any provisions of House Bill No. 335 will prohibit Intervener from further carrying on his arrangement with Peden Company.

As to the many allegations contained in said Paragraph 8 of said intervention, which purport to show what the [fol. 128] provisions of House Bill 335 are, Respondents say that they prefer that the Act speak for itself. Respondents say that Intervener, under the terms of said Bill, may operate without obtaining a permit for a period of thirty days and as long thereafter as may be necessary for the Commission to determine its application, and that it will not be necessary for Intervener to stop operations until such a permit is obtained, but, on the contrary, that Intervener may operate without interruption. Respondents deny that a permit is not distinguishable in substance or form from what the Act terms a Certificate of Public Convenience and Necessity, and Respondents say that the requi-

sites for making an application and the necessary proof and the certificate on the one hand, and the permit on the other, are all substantially different, both in substance and form; and Respondents further say that it is not necessary when securing a permit to prove that public convenience and necessity require such operation which, itself, is the primary requisite and distinction which determines the character and nature of a certificate of convenience and necessity. Respondents deny that Intervener is not a common carrier and Respondents say that he has admitted that he is a common carrier by taking out a Class B Permit under the former Motor Carrier Law.

[fol. 129] Respondents admit that intervenor will be compelled to charge a rate not less than the rates prescribed for common carriers for substantially the same service, but denies that intervenor will have to charge such rates as are designated by the Commission for a common carrier, and says that intervenor may charge any rate above the minimum rate prescribed for common carriers. Respondents deny that said act endows the Railroad Commission with the power and authority to handle and conduct the affairs of intervenor's business in the same manner and with the same result as the regulations of a common carrier are controlled by it under the act, and that in order for intervenor to be permitted to transport commodities over public highways for hire he is necessarily required to make himself a common carrier. In this connection respondents affirmatively allege that under said act a common carrier is required to secure a certificate of convenience and necessity, whereas a contract carrier, such as intervenor alleges himself to be, is required to secure only a permit; that the common carrier must prove that the public convenience and necessity demands his service, whereas the contract carrier merely has to prove, in order to get a permit, that existing common carrier service in the territory involved will not be impaired. Under said act the rates, both maximum and minimum, of common carriers are to be fixed by the Commission, whereas only the minimum rate of contract carriers is fixed. Respondents say that this provision with respect to contract carriers is necessary and that one of its purposes is to preserve the public interest in efficient transportation over the highways and make possible a [fol. 130] coordinated use of the highways. Further, in

this connection respondents say that the termini of the common carrier are regulated, whereas those of the contract carrier are not; that the services and schedules of common carriers are regulated, whereas those of contract carriers are not; that in general common carriers and contract carriers are regulated in an entirely different manner and different characteristics exist as to each, and that in no manner does the said act require a contract carrier, such as intervenor alleges himself to be, to become a common carrier, nor does such act require a contract carrier to assume the characteristics of a common carrier.

Respondents admit that under said act intervenor is required to keep accounts in accord with rules established by the Commission.

Respondents deny that the Commission is authorized to reject his application for a permit if it feels that his service would "interfere," even in a relatively negligible way, with the service offered by common carriers serving substantially the same territory by railroad and motor trucks, and respondents say that the considerations which the Commission must pass upon in rejecting or granting an application for a permit are definitely set out in the act.

Respondents admit that intervenor must under said act carry Workmen's Compensation insurance and other insurance.

Respondents deny that under said act intervenor is required to take out cargo insurance, but said act specifically provides that the Railroad Commission of Texas shall not require cargo or merchandise insurance beyond the risk [fol. 131] involved, and consequently, if, in fact Peden Company does not expect or request any such insurance, that the Commission cannot, under said act, require cargo insurance to be carried by intervenor.

Respondents admit that by said act intervenor is subjected to further control and regulation with reference to the size of boxes, packages, barrels or bales which he may carry, but prefers that said act speaks for itself.

Respondents admit that intervenor is prohibited from knowingly permitting any truck driver to operate a truck for a period longer than fourteen (14) consecutive hours, but prefers that the provisions of the act speak for themselves.

Respondents admit that said act requires that intervenor's drivers secure driver's license as under the terms and provisions of said act which respondents prefer shall speak for themselves.

VIII

Answering paragraph 9 of said intervention, respondents deny that each of said allegations, or any of them, are regulations making intervenor become a common carrier, or making intervenor assume characteristics of a common carrier, and respondents deny that such regulations are common carrier regulations or that intervenor is required, in effect, to become a common carrier under the provisions of said act, or is required to subject it to all common carrier regulations prescribed by the act, or that any of the provisions of said act are contrary to his constitutional rights to use highways, or that he has a constitutional right to use highways, or that the effect and intention of the act is to protect common carriers by railroad and by motor truck, [fol. 132] and thus to control competitive conditions of carriage upon the highways; that said act is not a regulation of the highways for the preservation of the highways and the safety of those engaged in using the highways, but is a regulation of business conditions as among those using the highways in order to grant favors to one designated class of users and to restrict the other class of users, so that each class of users may be regulated in their competitive dealings.

Respondents further deny that the purpose and effect of the act was to make him a common carrier and to impose upon him all of the restrictions of a common carrier in order that he might be unable to carry out a private contract for the operation of his trucks upon the highways, or that the act exacts from him the giving up of his constitutional rights to the use of the highways unless he will come before the Commission and make himself a common carrier.

In this connection respondents allege that the requisites for a common carrier certificate and the requisites for a contract carrier permit are distinct and different. The requisites for an application for each are different. The different regulations in many respects are applied to the common carrier than are applied to the contract carrier; that under the terms of said act a contract carrier such as intervenor al-

leges himself to be is not required to become a common carrier, nor is required to assume the characteristics of a common carrier.

IX

Answering paragraph 10 of said intervention respondents admit that said act does not prohibit from anyone the use of the highways for the carriage of their own freight, but [fol. 133] denies that this intervenor or anyone is required to give up his status as a private contract carrier and subject himself to all the regulations of a common carrier as is more fully alleged herein. In this connection, respondents say that intervenor or anyone else in his status may constitutionally be forbidden to use the public highways of the state in the transaction of the business of carriage of goods for hire.

Respondents deny that said act gives the Railroad Commission powers alleged in this paragraph of said intervention, but admit that said act gives the Commission certain powers with respect to character of packages and method of loading same which intervenor may transport. Respondents admit that intervenor will be required to carry Workmen's Compensation insurance, and that those hauling their own commodities upon the highways in their own trucks are not required to carry such insurance, and respondents admit that intervenor's drivers are limited in the hours of service upon the highways, and that the drivers of motor trucks who are hauling their own commodities are not subject to such restrictions.

Respondents admit that intervenor is required by said act to have drivers who have secured driver's licenses, and that those transporting their own commodities in their own trucks and not for hire are not required to have such driver's licenses under the terms of said bill.

Respondents admit that intervenor, under the terms of said act, is required to obtain a permit, but respondents deny [fol. 134] such permit is nothing more or less in substantial effect that a certificate of public convenience and necessity, and respondents deny that the use of the two terms is a mere pretense to distinguish, without distinction in fact, and is a mere veiled attempt to distinguish in form and designation without distinction in substance and fact, all of which is more fully alleged hereinbefore.

X

Answering paragraph 11 of said intervention, respondents admit the allegations in the first unnumbered paragraph thereof, but prefer that the act speak for itself.

Respondents say they are not informed as to whether or not intervenor's trucks are operated exclusively for the Peden Company, or as to whether or not they are operated to transport property for compensation or hire between two or more incorporated cities, towns or villages over fixed routes, regular schedules or fixed termini, but respondents deny that under the provisions of said act intervenor will not be permitted to carry out his contract, if any, with the Peden Company without violating said act, or cannot operate his trucks after the effective date of said act, and cannot proceed with his operations until after his application has been filed, notice given thereon and action taken thereon by the Railroad Commission of Texas, or that intervenor will be prohibited under the provisions of said act from so operating until the Railroad Commission has passed upon his application for a permit; and respondents deny that intervenor will be subject to arrest for a violation of said act until the Railroad Commission has passed upon his application for permit, and that intervenor would necessarily have to breach his contract, if any, and suffer the loss of his rights [fol. 135] and interest in said contract, if any, or any profitable business connections which he may have with said company, or that any profitable business in which he is engaged will be wholly destroyed, or that the provisions of said act would occasion him the loss of many thousands of dollars, deprive his trucks of any profitable employment, and amount to destruction of the legitimate business of intervenor, or result in an impairment by legislative fiat of an existing contract; or that the public has not interest therein; or that intervenor will be deprived by the provisions of said act of his property without due process of law; or denied the equal protection of the law; or that any of the provisions of said act will result in the loss to him of a large sum of money by reason of the fact that said equipment could not be profitably used for any other purpose; or that said act would greatly depreciate in value the property of intervenor because many other persons in the state would be in the same position as intervenor.

XI

Answering paragraph 11 of said intervention, respondents deny that the enforcement of said act is against him or will mean a destruction of his business; that unless respondents are restrained intervenor will suffer injuries of an irreparable and inestimable nature.

Respondents are not informed as to when intervenor must transport said commodities, or as to what rates the Railroad Commission has or will adopt for carriers such as in- [fol. 136] tervenor, or as to what rates intervenor has charged in the past or will in the future charge the Peden Company, or as to whether the minimum rates that the Railroad Commission must prescribe under the terms of said act are higher than the rates now charges to Peden Company by intervenor, but respondents deny that intervenor has any valid contract with Peden Company as is more fully alleged hereinbefore.

Respondents deny that intervenor cannot comply with said act and continue his business. Respondents deny that they have threatened to enforce said act against intervenor in all its provisions, and in fact it will be their duty to do so unless they are restrained by injunction from so doing; and that the enforcement of the same would deprive intervenor of his constitutional rights to the use of his property and rights in property without due process of law, and would deny to intervenor the equal protection of the laws.

XII

Answering paragraph 13 of said intervention, respondents deny that said intervenor will be unable to retain drivers for his motor vehicles without a restraining order from this court against respondents.

Respondents further deny that intervenor, unless granted a restraining order by this court, will be deprived of his right to use his motor vehicles on the public highways in the pursuance of his contract, if any, with the said Peden Company, or that intervenor will be coerced by the provisions of said act in any respect whatever.

[fol. 137] XIII

Answering paragraph 14 of said intervention, respondents deny that intervenor has no adequate remedy at law

and that the threatened damages are irreparable and incapable of complete judicial ascertainment, and that there is nobody to whom intervenor can legally look to respond therefor, and respondents affirmatively allege that intervenor has a complete, full and adequate remedy at law.

And come now respondents herein and for affirmative answer, show to the court as follows:

I

Respondents here adopt and incorporate herein, the same as if set out herein in full, the affirmative allegations in their answer to the petition of J. H. Stephenson in this cause.

Wherefore respondents pray that the relief asked for by complainants and intervenor herein be in all things denied and that the temporary injunction prayed for be denied and that the act in question be in all things sustained and held valid; and that they be granted such other and further relief at law and in equity to which they may be entitled, and that they recover from the complainants and intervenor all costs herein expended.

James V. Allred, James V. Allred, Attorney General of Texas; T. S. Christopher, T. S. Christopher, Assistant Attorney General; Albert Hooper, Albert Hooper, Assistant Attorney General, Solicitors of the Respondents. W. L. Cook, Albert Reed, of Counsel.

[fol. 138] [File endorsement omitted.]

Duly sworn to by T. S. Christopher. Jurat omitted in printing.

[fol. 139] In United States District Court

[Title omitted]

Respondent's Answer to Intervention of Finnegan and Arnett—Filed Sept. 9, 1931

Now come the respondents, T. Binford, O'Brien Stevens, R. J. Martin, J. R. Wright, Jesse E. Martin, Walter Prichard, J. M. Faulkner, Cone Johnson, W. R. Ely, E. K.

Martin, L. G. Phares, R. V. Abernathy, James V. Allred, and R. S. Sterling, and answering the intervention of W. S. Finnegan and P. E. Arnett, said respondents say:

I

For answer to paragraph I of this intervention, respondents deny that the intervenors herein are contract carriers as alleged by them or that they carry in that capacity alone, except that as to the intervenor P. E. Arnett respondents are uninformed as to his method and manner of operation and, therefore, are uninformed as to the capacity in which he operates.

II

For answer to paragraph II of this petition of intervention, respondents say that they are uninformed as to what trucks or vehicles are operated by the intervenors Finnegan and Arnett or as to what contracts, if any, under which they operate and say that they are not informed as [fol. 140] to whether or not said intervenors are operating their own trucks or other vehicles but deny that said intervenors operate solely as contract carriers, except as to the intervenor Arnett and as to said intervenor Respondents say that they are uninformed as to the contracts, either verbal or written, if any, held by these intervenors but respondents say that intervenors' allegations of a contract are so indefinite and uncertain that they are not sufficient as an allegation of contract such as to enable this court to consider the same but if, on the other hand, respondents are mistaken as to this, respondents say that they are uninformed as to the matters and things and conditions and covenants covered by said contracts, either verbal or written, if any, or the character of service to be rendered and required to be rendered under the terms and conditions of the contract.

Respondents specially deny that the intervenors are prohibited from transporting commodities over the highways of this State by the terms of the Act complained of or that Intervenors will be compelled to discontinue the pursuit of their business or that they will be prohibited from carrying out the terms of their contracts, if any they have. Respondents specially deny that intervenors operate solely

as contract carriers as alleged by them, subject to the qualification hereinbefore made in this connection and deny that intervenors have in any manner been threatened and respondents specially deny that the penalties under the Act of the Legislature under consideration are unduly severe in their terms.

III

In answer to paragraph III of intervenor's petition wherein the intervenors adopt, approve, ratify, reallege and confirm the allegations of the original bill of complaint, respondents refer to their answer to said original bill in connection with these matters and things and here [fol. 141] and now adopt, approve, ratify, reallege and confirm all of their answers to the original bill in connection with all of those matters the same as though set out in this answer to this petition of intervention in full.

IV

For answer to paragraph IV of said petition of intervention, respondents say that they have heretofore answered all of the allegations of paragraph I of the original bill of complaint in their original answer to said bill and respondents here and now adopt, approve, ratify, allege and confirm all of their answers as found in their original answer to the bill of complaint to said paragraph I of said original bill as answer to this paragraph the same as though the same were set out herein in full.

V

For answer to paragraph V of intervenors' petition of intervention, respondents say that they are not informed as to whether or not the intervenor Finnegan has a contract with West Texas Motor Freight Lines or with any other person, firm or corporation but, in this connection, respondents would specially show to the Court that such allegation of a contract is so vague and indefinite that this court would not be required and could not consider the same in that it is not shown and respondents do not know whether such contract is a verbal or written contract, nor the terms, conditions and

stipulations of the same except as may be plead in this petition of intervention; but in this connection if respondents are mistaken and this court does consider these vague, indefinite and uncertain allegations of a contract between intervenor Finnegan and any person, then respondents say that they are not informed as to the date of any such contract or as to when said contract became operative or as to what the intervenor Finnegan was required to do under the [fol. 142] contract or when the intervenor Finnegan was required to be operating under the contract or whether the intervenor Finnegan was required in carrying out the terms of the contract, if any, to operate over the highways of the State of Texas, nor between what points the intervenor was operating over the highways of Texas or in what territory said intervenor would operate, nor do respondents know from the allegations of the petition whether said intervenor Finnegan operates in such a manner as to make himself a contract carrier or a common carrier and in this connection respondents show that from the allegations of the petition itself, it is shown that the said intervenor is a common carrier over the highways of this State. Respondents say that they are uninformed of the rate to be charged by intervenor in the transportation of commodities for the West Texas Motor Freight Lines under the alleged contract, if in fact there is any such contract, nor what compensation the intervenor Finnegan was to receive for the services which he would be required to perform under the terms of said contract, if any. Respondents say as to the rate provisions of the alleged contract and as to all other provisions, conditions and stipulations thereof that for the purpose of the temporary injunction, that said intervenor should be required to rely upon the written evidence of such contract, if there be any, or any other satisfactory admissible proof of the existence of such contract, if there be any, as being the best evidence of the terms, conditions and provisions of any such contract; and respondents further assert that they have no information as to the existence of any such contract or its terms and conditions. Respondents say that they are not informed as to when said contract, if any, became operative or the time when said intervenor was required to begin rendering the service under the contract, if any, nor where the [fol. 143] intervenor would be required to render service or pick up or transport the commodity under said contract, if

any, or the manner in which they would be carried on the highways over which they were to be carried, nor the time within which they were to be carried. Respondents specially deny that the transportation of said commodities over the highways of this State under the conditions plead in the petition of intervention are such as to make such transportation an interstate shipment within the meaning of that term but say that they are not attempting to regulate the interstate commerce under the provisions of the alleged Act of the Legislature except in so far as they may be proper police regulations of the State of Texas. Respondents say that they have no knowledge of the term of the contract alleged, if any, and that they are uninformed as to when the said contract was entered into or as to when said contract will terminate.

VI

For answer to paragraph VI of said petition of intervention, respondents say that they are uninformed as to the existence of any alleged contract between intervenor Arnett and Linde Air Products Company or any other person, firm or corporation within the State of Texas, nor when said contract was entered into, nor when the same will expire or terminate, but respondents specially show that the allegations as to any such contract, if any such contract there is, are so indefinite and uncertain that this court may not and would not be required to consider the same and respectfully show that it is not shown in said petition of intervention whether the alleged contract, if any contract there is, is a verbal or written contract, nor what the terms and stipulations of said contract may be; but respondents say that if they are mistaken in [fol. 144] this, that they have no knowledge and are uninformed as to when the intervenor Arnett was required to begin transporting commodities over the highways of this State under any such alleged contract, nor the manner in which such commodities were required to be transported, nor the points of origin*al* or the points of destination of any such commodities. Respondents also say that they are not informed as to the class of commodities which intervenor Arnett is carrying over the highways of this State and that they are not informed as to the class or character of commodities which the intervenor Arnett is required to carry under the alleged contract with Linde Air Products Com-

pany, if any such contract there is. Respondents say that they are uninformed as to the transportation in which the intervenor Arnett is now engaged or whether or not said intervenor Arnett is engaged in the transportation of the commodities under the alleged contract with Linde Air Products Company, or whether or not there now exists the enforcement contract between the intervenor Arnett and the Linde Air Products Company, or whether or not said intervenor would be requested to transport commodities under such alleged contract, if any contract exists. Respondents say that they have no knowledge and are wholly uninformed as to a preexisting contract between intervenor Arnett and any other person and especially with Linde Air Products Company and that they are wholly uninformed and are not able to ascertain from the petition and especially from this paragraph whether or not there is a contract and especially as to whether or not there is an existing valid contract between the intervenors Finnegan and Arnett and the West Texas Motor Freight Lines and Linde Air Products Company or any other persons, firms or corporations and if there is any such contracts, what the intervenors will be required to do to comply with the provisions thereof; but respondents specially deny that intervenors will be prohibited under the terms of the Act in question from carrying out their said contracts.

[fol. 145] Respondents, in referring especially to the allegations of the petition of intervention, which is to the effect that said intervenors' manner of transportation is in violation of the said Act of the Legislature, here affirmatively show to the Court that said intervenors entered into said alleged contracts, if in fact any such contracts exist, with knowledge and charged with notice of the powers of the State to enact proper police regulations pertaining to the highways of the State and respondents here affirmatively show that the said intervenors will be required to comply with such proper police regulations and that they may not now be heard to complain of such regulations. Respondents specially deny that the said intervenors will be compelled to abandon their business and will be unable to carry out their contracts or that said intervenors will be irreparably injured or damaged.

VII

For answer to paragraph VIII of said petition of intervention, respondents say that they have heretofore answered fully to Article III of complainants' original bill and in so far as said article is now adopted and approved and ratified by these intervenors, respondents refer to their original answer to said original bill of complaint and here now adopt, approve, ratify, re-allege and confirm all of said answer as pertains to said Article III of the original bill as fully as though the same were set out herein at length.

VIII

For answer to paragraph IX of said petition of intervention, respondents say that they are uninformed as to what new or additional motor equipment was acquired by the intervenor Finnegan, nor are they informed as to what new or additional motor equipment was acquired by the intervenor Arnett in order to place said intervenors in a position to carry out the terms of their alleged contracts, if [fol. 146] any such contracts exist, or whether or not said intervenors were reasonably required to acquire such new and additional or other motor equipment to carry out the terms of said alleged contract but respondents here affirmatively allege that such allegations are wholly irrelevant and immaterial to any issue which may be presented in this case in that it is affirmatively shown that said intervenors, by reason of the terms of said contract, if any, acquired no right to the use of the highways of the State of Texas and that they especially acquired no vested right in the use of the said highways and said contracts, if any, were entered into with notice and knowledge of the power of the State of Texas and the Legislature thereof to enact proper and reasonable police regulations pertaining to the highways of the State of Texas. Respondents say that they are not informed as to whether or not any such equipment or any other equipment operated or proposed to be operated by these intervenors was equipped in accordance with the laws of the State of Texas relative to the operation of trucks on the highways of this State, nor are they informed as to whether or not such motor equipment was properly and lawfully licensed as required under the high-

way laws of the State of Texas, nor are they informed as to whether or not such motor equipment as is operated and as has been operated by said intervenors was operated in conformity with the laws of the State of Texas. Respondents say that they are uninformed as to what gross or net earnings the intervenor Finnegan would receive under the terms of the alleged contract but show that, for reasons already hereinabove set forth, that said allegations are wholly irrelevant and immaterial to any issues which may be presented to or be considered by this court. Respondents further say that they are uninformed as to what gross earnings intervenor Arnett would receive under the terms and provisions of the alleged contract between the intervenor Arnett and the Linde Air Products Company [fol. 147] or any other person, firm or corporation and reassert that said gross and net earnings are wholly irrelevant and immaterial to the proper issues in this case. Respondents specially deny that these intervenors or either of them will suffer or sustain the loss of several thousand dollars or any other sum of money and specially deny that said intervenors or either of them will suffer any substantial loss due to their alleged investment made for the purpose of carrying out the terms of said alleged contract or for any other purpose and respondents say that they are wholly uninformed as to the amount, if any, involved in this controversy.

IX

For answer to paragraph X of said petition of intervention and in so far as the same adopts and approves the allegations of Article VI of the original bill of complaint, respondents say that they have heretofore answered said Article VI of said original bill in their original answer to said bill and respondents here now refer to the original answer to said Article VI and here now adopt, approve, ratify, re-allege and confirm said answer to said Article VI in all things as though the same were set out herein in full.

X

For answer to paragraph XI of said petition of intervention and in so far as the same adopts and approves the allegations of Article VII of the original bill of complaint, respondents say that they have heretofore answered said

Article VII of said original bill in their original answer to said bill and respondents here now refer to the original answer to said Article VII and here now adopt, approve, ratify, reallege and confirm said answer to said Article VII in all things as though the same were set out herein in full.

XI

For answer to paragraph XII of said petition of intervention and in so far as the same adopts and approves the [fol. 148] allegations of Article VIII of the original bill of complaint, respondents say that they have heretofore answered said Article VIII of said original bill in their original answer to said bill and respondents here now refer to the original answer to said Articles VIII and here now adopt, approve, ratify, re-allege and confirm said answer to said Article VIII in all things as though the same were set out herein in full.

XII

For answer to paragraph XIII of said petition of intervention and in so far as the same adopts and approves the allegations of Article IX of the original bill of complaint, respondents say that they have heretofore answered said Article VIII of said original bill in their original answer to said Article IX and here now adopt, approve, ratify, re-allege and confirm said answer to said Article IX in all things as though the same were set out herein in full.

Respondents say that they are wholly uninformed as to the class and character of commodities transported by the intervenor Finnegan over the highways of this State or into what classifications said commodities would fall under the regulations of the Railroad Commission of this State. Respondents say in connection with the order of the Railroad Commission set out in said petition of intervention that it is not shown whether or not this is all of the order of the Commission or whether or not the said Railroad Commission of Texas was attempting to regulate other than the minimum rate of contract carriers but in this connection, if said order should be all of the order of the Railroad Commission of Texas, and if said order attempts to regulate other than the minimum rates of contract carriers which, however, respondents deny, then respondents would

affirmatively show that this order of the Railroad Commission is not in any wise under attack in this suit and that if such order attempts to regulate other than the minimum [fol. 149] rate of contract carriers, that the same can amount to nothing more than an illegal and void order of the Railroad Commission in so far as it relates to the rates to be charged by contract carriers and that such illegal and void order could not, should not and will not be considered by this Court as any reason for holding the act in question unconstitutional. Respondents specially deny that said order regulates other than minimum rates to be charged by contract carriers and affirmatively shows to the Court that under the former provisions of the law the Railroad Commission was required to and may regulate the minimum and maximum and the minimum or maximum rates to be charged by Class A motor carriers which were common carriers under the preexisting law of the State and that the allegations of intervenors petition can amount to nothing more and do amount to nothing more than an interpretation placed upon it by said intervenors which respondents affirmatively show is unwarranted and that said order would relate to and does relate to only the minimum rates to be charged by contract carriers and as required under the provisions of the Act in question. In connection with the definite rates agreed to be charged under the alleged contract, if any there be, respondents would affirmatively show that such contract could not have and did not confer upon any of the contracting parties, if any contracts exist, any vested right in the use of the highways of this State for personal gain and again affirmatively show that said contracts were entered into by all parties, if said contracts were entered into, with notice and knowledge of the power of the Legislature to enact proper police regulations and to regulate those using the highways for compensation or hire or for personal gain when such operation over the highways is conducted in such manner as to attach to it a public interest. Respondents say that they are wholly uninformed as to the agreements or stipulations relating to the rates to be charged or what rates were to be charged from any particular point of origin to any particular point [fol. 150] of destination under the alleged contracts by the intervenors with any other contracting parties. Respondents deny that the intervenor Finnegan is bound by law to

charge the rates fixed in said alleged contract, if any there be, and say that they are not informed as to any such contract or whether or not the same is now in force or whether or not the intervenor Finnegan is bound by the same or whether or not any such alleged contract is a valid, binding and subsisting contract at this time.

XIII

For answer to paragraph XIV of this intervention, respondents say that the Act of the Legislature complained of is not an attempt to and does not attempt to convert a private carrier into a common carrier and that this allegation is only the conclusion and interpretation of the pleader which he has placed upon the Act and erroneously so because respondents affirmatively show that the Act treats private carriers as private carriers and that there is nothing in the provisions or regulations which attempts to or does make of them common carriers or which would require the dedication of the property of such private carriers to the public in the sense in which it is required to be so dedicated in the case of common carriers, but said Act treats the two classes of carriers entirely separate and distinct and makes different requirements as to each of them. Respondents deny that the Act empowers the Railroad Commission to deal with contract carriers in substantially the same way and with the same authority that it deals with common carriers. Respondents specially deny that the permit required to be obtained under the provisions of the Act by contract carriers is practically the same or is in any wise the same as the certificate of public conve- [fol. 151] nience and necessity required by the Act to be obtained by common carriers, and say that the regulations are wholly different, that the form of applications are wholly different, that the facts to be shown in order to obtain a permit as a contract carrier are wholly different from those required to be shown by common carriers, especially in that a common carrier is required to show the existence of a public necessity, and that the public convenience will be served, in order to authorize the Railroad Commission to grant a certificate of public convenience and necessity, while it is only required in the case of a permit to show that the granting of the permit for a contract carrier will not in-

terfere with the operation of a common carrier serving the same territory, a distinction clearly showing within itself that there is no attempt to make a private carrier into a common carrier or to deal with him as such, or to place upon such private carriers the same burdens or regulations as are placed on common carriers. Respondents specially deny that this Act, when considered as a whole, shows any intent upon the part of the Legislature to imbue the Railroad Commission of Texas with authority to deal with or to handle the affairs of a private carrier as a common carrier. Respondents specially deny that there is any attempt made to require bonds of contract carriers other than those required to be carried which affect the public interest and which protect the public other than the persons with whom a contract carrier may contract. Respondents say, as to the further provisions of this paragraph relating to the requirements of the law, that the Act itself has been set out in full [fol. 152] in the original bill of complaint and respondents say that they prefer that the law speak for itself in this regard rather than any interpretation which may be placed upon the law by the pleaders. Respondents say in connection with the hearing required to be held upon applications for a permit that while it is true that the hearing may be held in Austin, Texas, that it is and has for a long time been the custom of the Railroad Commission of Texas to sit and to hold these hearings in various sections of the State and at points which will be most convenient to the applicant for such a permit. Respondents specially deny all of the provisions of the Act referred to in this paragraph amount to a dedication of the property of a private carrier to a public use in such way as to convert said private carrier into common carriers for hire, and Respondents further specially deny that the results of the law amount to a confiscation of property without due process of law or that any part of the law is in violation of the 14th Amendment to the Constitution of the United States.

XIV

In answer to paragraph XV of this intervention, respondents say that as to the requirements of the law, respondents prefer that the law speak for itself. Respondents deny that the interpretation placed upon the Act by the intervenors

requires the Railroad Commission to prescribe maximum or minimum or maximum and minimum rates for contract carriers and, preferring that the law speak for itself, affirmatively show- to the Court that the law only attempts to authorize the Railroad Commission to prescribe minimum rates for contract carriers. Respondents show to the [fol. 153] Court that most of this paragraph is a re-pleading of the terms, provisions and requirements of the Act itself, except insofar as the same may be the pleaders' interpretation of said Act, and in this connection respondents again say that they prefer that the Act speak for itself as to its requirements. Respondents again specially deny that the permit required of a contract carrier is anything in the nature of or operates as a certificate of public convenience and necessity, and say that such allegation in said petition of intervention is wholly unwarranted by the terms, provisions and requirements of the law itself. Respondents say that they are not informed as to the common carrier lines existing over the highways or otherwise in the territory in which these interveners operate under their alleged contract and again in connection with this paragraph respondents say that as to the requirements of the law that they prefer that the Court consider the law itself rather than the interpretation placed thereon by the interveners. Respondents specially deny that the provisions of the law referred to in this paragraph or any other provisions of the law require interveners to dedicate their property to a public use or that it converts them into common carriers. Respondents specially deny that the provisions of the act mentioned in this paragraph, or any other provisions of the Act, amount to a taking of property without due process of law. Respondents deny that the requirements of the Act mentioned in this paragraph or in any other paragraph of the law are unwarranted, unreasonable or unnecessary, and [fol. 154] respondents further deny that it is an attempt on the part of the Legislature to regulate private business unwarrantedly but on the other hand affirmatively allege that such regulation as is provided has been provided in the public interest and affects business only insofar as it is affected with the public interest. Respondents e-pecially deny that there is anything in any provision of the law which denies to interveners or the class which they repre-

sent, the equal protection of the law or that any provision thereof is in contravention of the 14th Amendment to the Constitution of the United States. Respondents specially deny that the requirements of the Act under attack are an unreasonable, arbitrary or discriminatory classification. Respondents affirmatively plead and show that what is commonly known as House Bill No. 336, does regulate all alike and especially does it regulate the persons, firms and corporations and character of movement over the highways complained of in this paragraph, and especially as to the weight of loads, together with many other requirements. Respondents specially deny that the regulations imposed by this Act are unnecessary regulations and affirmatively show that there has arisen a condition upon the highways of this State and within the business of transportation of commodities throughout this State which does vitally affect the public interest and demands and makes absolutely necessary the regulation imposed by the Act. Respondents specially deny that the regulation is arbitrary, unjust or unreasonable and specially deny that it discriminates against intervener or other contract carriers or that it discrimi-[fol. 155] nates between interveners and any other persons lawfully using the highways of this State. Respondents specially deny that the provisions and requirements of the act bear no reasonable relation to the ends sought to be attained, but affirmatively assert that they do bear a reasonable relation to the purpose to be attained and that they are reasonably calculated to attain the purpose in view and to correct the evil sought to be corrected. Respondents specially deny that any provision of the Statute is in contravention of any part of the 14th Amendment to the Constitution of the United States as alleged.

Respondents specially deny that the authority conferred upon the Railroad Commission of Texas to prescribe the minimum rates for contract carriers is unjust, unreasonable or arbitrary, and respondents specially deny that such authority discriminates against these interveners and other contract carriers similarly situated or that it is an attempt to interfere with and to regulate private business and especially do respondents deny that such carriage upon the highways of the State does not affect the public other than those persons with whom interveners or contract carriers have

contract, but, on the other hand, respondents affirmatively allege that a condition has arisen where in the business of the transportation of commodities over the highways of this State and in the use of the highways in any other way which has vitally affected contract or private carriers over the highways of the State with a public interest. Respondents deny that the provisions of the Act are an unreasonable or [fol. 156] arbitrary classification, but affirmatively allege that the provisions of the Act are such as are reasonably calculated to attain the other purpose of the Legislature and remedy the situation and the evil where it is most felt. Respondents specially deny that the provisions of the Statute cited in paragraph XV, Sec. c, amount to a taking of the property of interveners without due process of law or that they are in contravention of the 14th Amendment to the Constitution of the United States.

Respondents deny that the movement of commodities by the intervener, Finnegan, are interstate commerce but on the other hand respondents say that if they are mistaken in this that the law does not attempt to regulate interstate commerce except insofar as it may require the carrier to comply with the proper police regulations of the State. Respondents say that they are not informed as to the origin of commodities moved by the intervener Finnegan but affirmatively show that the point of origin alone does not control the interstate commerce feature nor ipso facto make the movement an interstate movement and respondents say that they are not informed of all of the conditions of the movement so that neither they nor this Court could say that the movement is an interstate movement as alleged. Respondents specially say that without a knowledge of the billing of these commodities, which is nowhere shown, it would be impossible for this Court to find that the shipments are interstate shipments as alleged, and again respondents specially deny that such movements over the highways of this State are interstate commerce. Respondents deny that the requirements of this Act constitute an undue burden upon [fol. 157] interstate commerce in that respondents show that there is no attempt in the Act to regulate interstate commerce except insofar as the regulations are proper police regulations of the State. Respondents therefore deny that the provisions of the Act are in contravention of the commerce clause of the Constitution of the United States.

Respondents specially deny that the requirements as to drivers' licenses or the period of consecutive working hours of any driver are arbitrary or unjust or that such requirements discriminate against the interveners and other contract carriers as against any other persons, firms or corporations ow-ing or operating trucks, but, on the other hand, affirmatively assert that such requirements are reasonable requirements and that they are reasonably calculated to correct an evil where it has been most felt and respondents say, therefore, that such requirements are not in contravention of the 14th Amendment to the Constitution of the United States. Again respondents deny that contract carriers are not affected with the public interest, and again they deny that the public has no interest in the operation of this class of carriers over the highways, and respondents deny that the regulations prescribed in such Sections a, c and d, of Section 4, are unreasonable, arbitrary or unjust or that they discriminate between persons, firms or corporations carrying commodities over the highways of this State. Respondents deny that the regulations bear no reasonable relation to the end sought to be accomplished or that such regulations are unwarranted or unreasonable, and further deny that any provision of this [fol. 158] Act deprives these interveners, or any contract carrier, of property without due process of law and without compensation, or that any provision thereof is in violation of the 14th Amendment to the Constitution of the United States. Respondents deny that Section 13a of said Act is an unreasonable regulation as alleged or that it discriminates against these interveners or others. Respondents specially deny that it is an attempted arbitrary designation or classification of these interveners or other contract carriers or that such regulation is unreasonable or unwarranted or that it is an unwarranted interference with private business, and, again, respondents especially deny the allegation that the public has no interest in the operation of this character of carriers on the highways of the State and respondents deny that the regulations bear no reasonable relation to the end sought to be obtained and that they bear no reasonable relation to the safety of the public on the highways and to the preservation of the highways themselves but, on the other hand, affirmatively show that said carriers are affected with the public in-

terest and that the public is vitally interested in their operation over the highways of this State and that the regulations are such as are reasonably calculated to correct an evil now existing upon the highways of this State, and respondents again especially deny that this requirement, or any other requirement of this Act, is in violation of the 14th Amendment to the Constitution of the United States. Respondents deny that there is any attempt to require bonds or insurance of contract carriers under the provisions of Section 13 of the Act other than such as are [fol. 159] necessary to protect the public other than those persons with whom the contract carrier may contract. Respondents deny that there is any discriminatory provision of this portion of the Act as alleged either as between these interveners and other common carriers and any other person, firm or corporation using the highways. Respondents specially deny that the regulation is an unreasonable, unwarranted or arbitrary requirement or that it amounts to a taking of property of these interveners or those similarly situated without due process of law in contravention of the 14th Amendment to the Constitution of the United States.

Respondents deny that interveners are private carriers as alleged, the same being a mere inference or conclusion of the pleader. Respondents say that they are uninformed as to what contracts interveners have entered into, if any, nor whether or not they are so operating or would so operate under any such alleged contracts as to make them anything but private contract carriers and especially do the respondents deny that the operation is not such as the public has an interest in, but affirmatively assert that it is such that the public, other than the persons with whom these interveners contract, are vitally interested in. Respondents specially deny that this portion of the Act is in contravention of any part of the 14th Amendment and specially that it contravenes the due process of law or the equal protection clause thereof. Respondents again deny that the movements of commodities by the intervener Finnegan are interstate moves and respondents again show that there is no attempt to regulate interstate commerce except in so far as such regulations may be a proper exercise of the police power of the State.

[fol. 160] Respondents deny that the provisions of this Act are a scheme to regulate, supervise or control the business of these interveners or other contract carriers except in so far as such regulation is reasonably necessary as applied to those operating in such a way that their operation has become affected with the public interest. Respondents deny that there is no distinction made between the character of regulation between a common or private or contract carrier, and especially deny that there is anything in the Act which attempts to or does convert a private carrier into a common carrier.

Respondents especially deny that there is no essential difference between a permit and a certificate of public convenience and necessity and affirmatively shows that there is a very material difference between a permit and a certificate of public convenience and necessity. Respondents deny that there is any similarity between the two or that there is any similarity in the requirements in order to obtain the one as against the other but, on the other hand, affirmatively show that the two are dealt with entirely separate and distinct and that there is a material and substantial difference between the two. Respondents deny that such regulations as are imposed are unwarranted, arbitrary and unnecessary. Respondents specially deny that the provisions of this Act require or amount to an appropriation of the property or other business of contract carriers to the public use without compensation and without due process of law. Respondents specially deny that there is anything in the provisions of Section 6b which is unjust or unreasonable or which discriminates against these interveners or other contract carriers.

[fol. 161] XVI

Respondents show that they have heretofore fully answered Article XII of the original bill of complaint in their original answer filed to said bill and respondents here now refer to said answer to said Article XII and here now adopt, approve, ratify, reallege and confirm all their said answer to said Article XII of the original bill of complaint as fully as though said answer were set out herein in full.

And for affirmative pleading herein respondents show:

I

That they have made certain affirmative allegations in their original answer to the original bill of complaint herein filed and respondents here now refer to said affirmative allegations in said answer and here now adopt, approve, ratify, reallege and confirm all of said affirmative allegations in their said answer the same as though said affirmative pleadings were set out herein in full and at length.

Wherefore, having fully answered, respondents pray that the temporary injunction prayed for be in all things denied and that upon the final hearing hereof the permanent injunction prayed for be in all things denied; that the Act complained of and each and every provision thereof be held to be constitutional; for all costs of this suit and for all other and further relief which to this Court may seem necessary, meet or proper.

James V. Allred, Attorney General. T. S. Christopher, Asst. Attorney General. Elbert Hooper, Asst. Attorney General. W. L. Cook, Albert Reed.

[fol. 162] *Duly sworn to by T. S. Christopher. Jurat omitted in printing.*

[fol. 163] [File endorsement omitted.]

[fol. 164] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Equity. No. 479

J. H. STEPHENSON, Complainant,

vs.

T. BINFORD et als., Respondents

Before Hutcheson, Circuit Judge, and West and Kennerly, District Judges

OPINION OF THE COURT—Filed October 26, 1931

HUTCHESON, Circuit Judge:

Faced with the grave necessity of adequately regulating motor traffic on the highways of Texas in the interest at

once of the safety of the traveling public, the protection of the highways, and the maintenance of a safe and dependable transportation system, both by rail and by road for the people of the State, the Forty Second Legislature of Texas at its regular session enacted into law a legislative program designed and comprehensive enough to deal with and to remedy the mischiefs incident to unregulated use of the highways, including those arising from the unprecedented use of the highways by private contract carriers for hire.

As a part of this program it enacted into law Chapter 277, House Bill 335. This bill, basing upon the declaration of legislative policy "that the business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the [fol. 165] public interest'", specifically defined and undertook as to each to regulate the business on the highway of common and contract carriers for hire. It in effect declared the right to operate motor carriers over the highways to be a public franchise, and that no one should engage in that business except in pursuance of a franchise from the State so to do. It fixed the conditions of the franchise to be enjoyed by common carrier and by contract carrier respectively. The evidence of the franchise to be

---

NOTE 1. Sec. 22b. Declaration of Policy.—The business of operating as a motor carrier of property for hire along the highways of the State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public.

a common carrier, was designated a certificate of convenience and necessity; of the franchise to be a contract carrier, a permit.

To the Railroad Commission of Texas, as the body charged under the laws of the State with general supervision over, and as the administrative agent of the State in matters affecting its traffic and transportation laws, it confided, in cooperation with the Highway Commission, the administration of the Act. Before its effective date plaintiff, alleging himself to be a private contract carrier engaged presently and at the time of the enactment of the law in question in hauling freight over the highways of Texas exclusively under a single contract with the Southwest Freight Company, a freight forwarder, and that the Act, in violation of the Fourteenth Amendment, denied him due process and the equal protection of the laws, brought this suit to enjoin its enforcement. W. S. Finnegan, P. E. Arnett, and D. E. Beard intervened. All claimed to be similarly situated with the plaintiff, Finnegan as a hauler [fol. 166] exclusively for the West Texas Motor Freight Lines; Arnett for the Linde Air Products Line, and Beard for the Peden Iron & Steel Company exclusively and under private contract, and they ask the same relief. Finnegan alone claims to be a hauler in interstate commerce. His allegation in that respect is that though he hauls between points entirely within the State of Texas, the goods which he hauls have moved into Texas interstate, and that he hauls them as part of their uncompleted movement.

While the prayer is for relief against the Act in its entirety, the protest against those features of the bill which are directed to securing traffic safety and highway protection is very mild. Indeed, the validity of these provisions is in effect conceded. Summarized, these require the use on trucks of only competent drivers holding licenses; fix the off and on hours of the truck drivers; require the carriers to secure the public against loss from personal injuries; authorize the inspection and approval or disapproval by the Commission of the equipment to be used by the carriers; the manner of loading, the size and character of the packages, and the weight of loads; authorize the Commission to classify the highways as to congestion upon them and as to their character and ability to withstand

varying transportation uses, and generally confer upon the Commission complete supervision over the highways in the interest of their protection from abuse, and of the public safety.

To defray the expense of administering the Act and as a license or franchise fee, it exacts of the contract carrier a [fol. 167] permit fee of ten dollars, of the common carrier a certificate fee of twenty-five dollars, and of both common and contract carriers a license fee of ten dollars.

The power of the State to regulate and control the movements of motor vehicles over its highways in the interest of public convenience and safety, and for the protection of the highways, for the proper use of which it is trustee to the public, is of the widest scope, and provisions of this kind have been uniformly sustained. Buch vs. Kuykendall, 267 U. S. 314; Packard vs. Banton, 264 U. S. 140; Johnson vs. Perry, 47 Fed. (2d) 100 and three cases decided by this Court not yet reported, McLeaish vs. Binford, two cases, and Sproles vs. Binford.

We find no difficulty then, in sustaining against the attack of the suit and denying the prayer for injunction, as to all of the provisions above referred to, since each of them has direct relation to highway control and regulation, in fact, speaks the very language of such power.

The real attack of plaintiff and intervenors is pressed against those provisions of the Act which, based upon considerations of the public interest in the establishment and maintenance of a dependable transportation system for the State, authorize the Commission to grant or refuse permits to contract carriers upon consideration not only of questions of congestion upon the highway, the fitness and capacity of the contract applicant to conduct the business which he offers to do, but of conditions prevailing along the route proposed as to already existing adequate service by common carriers. Especially is the attack pressed against the right accorded by the Act of the Commission to grant or refuse the permit upon consideration of the whole transportation and traffic structure of the State, and upon a determination of whether the stability and integrity of that structure will be [fol. 168] bettered or injured by the grant. They take as their shibboleths the pronouncements of the Supreme Court in Michigan vs. Duke, 286 U. S. 571; Buch vs. Kuykendall,

267 U. S. 314; Frost vs. Commission, 271 U. S. 583 and Smith vs. Cahoon, 283 U. S. 553, that a legislature may not by its fiat convert a contract carrier into a common carrier, and that while the State may regulate the highways, it may not regulate private business done upon them.

They say that the terms of the Act authorizing the refusal of a permit if "the Commission shall be of the opinion that the proposed operation of any such contract will impair the efficient public service of any authorized common carrier then adequately serving the same territory"; authorizing it to fix minimum rates to be charged by contract carriers in no event less than those charged by common carriers; forbidding rebates and discrimination, and the making of contract charges less than those fixed by the Commission; requiring contract as well as common carriers to keep books of account and make reports to the Commission, and contract as well as common carriers to make bonds for the protection of shippers, are in the very teeth of these pronouncements.

The State replies that the great issues of public policy and sovereign power with which this bill deals may not be so naively disposed of with a phrase. That the Act in question here avoids the rock and whirlpool of the Frost case, the charge of uncertainty and indefiniteness of the Cahoon case. That by its declaration of policy and the clear distinction made and preserved in the Act between common and contract carriers it has escaped altogether the confusion and uncertainty in point of view which has manifested itself in the decisions of so many of the state courts and commissions in their efforts to sustain state action in the face of the con- [fol. 169] fident invocation of the phrase, the legislature may not by fiat convert a private carrier into a common carrier, first used broadly in the Duke and Buch cases of interstate carriers, and later in the Frost and Cahoon cases given limited application to the intrastate carriers there involved.[2]

NOTE 2.—Frost vs. R. R. Com. of Calif. 240 Pac. 26; Cahoon vs. Smith, 128 So. 632 (Fla.); Rutledge vs. Baughman, 153 Md. 297; Barber vs. Walker (Okla.) 259 Pac. 552; Davis vs. Metcalf (Wash.) 229 Pac. 2. The same confusion exists where the statutes are denied application. Hissem vs. Guran (Ohio) 146 N. E. 808; Hadad vs. State, (Ariz.) 201

The State insists here that the over simplification of highway problems for the irresponsible and unregulated private carrier, which those who invoke this magic phrase assert must come about under its aegis, may not in fact be accomplished; that the phrase has, by its overemphasis upon the limitations on state power given to the purely permissive status of a private carrier for hire, the false appearance of a status as of right at the expense of the power of sovereign states to govern men and things. That at last the effective solution of intrastate highway problems may be correctly approached only from the standpoint of the undoubted power possessed by a sovereign state to withhold entirely from carriers for hire the privilege of using its roadways as a place of business, Packard vs. Banton, 264 U. S. 140; Frost vs. Comm. 271 U. S. 583 or to grant a franchise to use them (Frost vs. Okla. Comm. 278 U. S. 515) affixing to the grant in the public interest such conditions as are deemed by the state to be for the public good, including the reasonable regulation of their rates and practices. Tagg Bros. vs. U. S. 280 U. S. 420; Sutter Butte Canal Co. vs. R. R. Com. 279 U. S. 125; Cotting vs. Kansas City 183 U. S. 85-91.

It declares that the State of Texas has from such viewpoint approached the solution of the great and pressing problems growing out of a highway system including state [fol. 170] and county roads, of nearly two hundred thousand miles on which state and county expenditures have been more than half billion dollars.

That by a complete and comprehensive act it has undertaken neither to convert private carriers into common carriers nor upon the pretext of regulating highways, to impose arbitrary restrictions upon the business of those who use them. That what it has done has been to put into effect the legislative policy above referred to, that the business of carrying for hire on the public roads is a business affectex with the public interest, which may be enjoyed only

---

Pac. 847; State vs. Nelson, (Utah) 238 Pac. 237; while in Georgia the matter has come to a deadlock. Ga. Pub. Service Comm. vs. Say, 154 S. E. 439 sustains the right to regulate private carriers, while McIntyre vs. Harrison, 157 N. E. 499 by divided court resulting from the failure of the Chief Justice to vote, it was held that private carriers could not be so regulated.

under legislative grant. That it has fixed the conditions of such grant, and that any person desiring to conduct his business over the public roadways may under the statute, freely electing the character of business he will engage in, apply for and by complying with the conditions fixed, obtain a franchise as a common or a contract carrier, according to his desire.

That this system of regulation designed in the interest of the public convenience will operate to bring highway order out of highway chaos, by preventing a further disintergation of the all but practically destroyed common carrier service on the roads. That the exercise of the powers which the Act confers will not only protect the roadways and the people on them from the results of reckless and careless operation, but will give to the whole people of the State a safe and dependable system of transportation for the carriage of their freight by highway.

Whether the policy which the State of Texas is now entering upon of bringing under regulation as to rates and practices all of its facilities which engage in the business of the carriage of goods for hire is economically wise and [fol. 171] sound; whether it will produce the results claimed for it, or will as plaintiffs contend, result in ultimate injury to the public, by depriving the public of the services of private business carriers, and of that competition which they in their unrestricted state afford are not matters with which we may concern ourselves.

The question before us, the State having acted, is merely one of State power. If the State had the power to set these experiments on foot, its action may not be interfered with. Upon that question we think the State has the right of it. A short statement of our reasons for this conclusion may serve to bring into sharper relief at once the problem which the case presented to us, and the method employed by us in its solution.

Of all the problems pressing upon the State none present more comprehensive, more far reaching, more troublesome aspects than do those arising from the effect upon the established common carrier transportation services by rail and road, of the rapidly increasing use of the highways for the carriage of freight for hire by persons assuming the real or pretended status of private contract carriers, and asserting their business to be unregulable. These problems

have been attacked in most, if not all of the states by statutes which differing in unsubstantial particulars, have been influenced by and have presented the same general theory, given full and definite expression by the Supreme Court of California in Frost vs. California, 240 Pac. 26, that since states may exclude carriers for hire, whether common or contract, altogether from the public roads, it may fix conditions upon their use of them.

These statutes early encountering in the Duke and Buck cases as to interstate commerce, and in the Frost case as to intrastate commerce the declaration of the Supreme Court [fol. 172] that private carriers may not by legislative fiat be converted into common carriers, have had checkered careers in the courts of the several states.[3] Most of the courts have felt constrained by the Frost decision to deny to the state the right to make existing regulations as to the common carriers applicable to private carriers; many of them have avoided the difficulty by finding that the carriers involved were in fact not private, but common carriers, while some of them have sustained the statutes on the ground that they did not attempt to convert private carriers into common carriers, but in effect imposed specific legal regulations upon each class of carrier, to which each must conform. Rutledge vs. Baughman, 56 A. L. R. 1047; Barbour vs. Walker, 56 A. L. R. 1049. The Supreme Court of Florida tried in Cahoon vs. Smith, 128 So. 632 to give effect to a statute of that state regulating private as well as common carriers, but found itself, as the Supreme Court of California had been in the Frost case, hoist on the petard of its own efforts at construction. Smith vs. Cahoon, 293 U. S. 553. The Supreme Court of Georgia has gotten itself into the uncomfortable position of apparently facing both ways, the full court through the Chief Justice in Ga. Public Service Com. vs. Say, 154 S. E. 440 sustaining the right to regulate private carriers, a divided court, the Chief Justice

---

Note 3.—Two excellent law review articles, "Regulation of the Contract Motor Carrier under the Constitution" Harvard Law Review, Vol. XLIV No. 4, p. 536 and Motor Carrier Regulation, Federal, State and Municipal" Columbia Law Review Vol. 26, p. 954 et seq. interestingly collect and discuss the authorities.

not sitting, in McIntyre vs. Harrison, 157 S. E. 508, later holding the contrary.

[fol. 173] Standing out in decisions, text books and law articles is the universally accepted doctrine that the use of public roads for the conduct of business thereon, whether by common or by private carriers, is an extraordinary use and as such is enjoyed not as a right, but as a privilege. That the state may altogether exclude hauling by carriers, common or contract intrastate from its roads is generally taken for granted. The difficulties of the states have arisen where, choosing a middle course between exclusion altogether and permitting unbridled use, they have sought to impose conditions upon private carriers the same as or analogous to those imposed upon common carriers, and here its difficulty has arisen, not out of efforts to regulate the manner of the use of the highways but, by controlling rates and practices, to regulate the business done thereon. Michigan vs. Duke, 266 U. S. 571; Buck vs. Kuykendall, 267 U. S. 314; Frost vs. Commission, 271 U. S. 583; Smith vs. Cahoon, 283 U. S. 553.

In view of these decisions whatever difficulties one may have in agreeing with the majority opinion in the Frost case, that the private carrier stands as to the state protected by the Federal constitution against a conditioning of its use of the roads, in the same case as foreign corporations in the cases cited there stood with reference to the right of resort to the Federal courts directly granted to them by the Federal laws, and the writer is one who experiences that difficulty, it must be fully conceded that if the case presented here is the same as that presented there, the power of the state must be denied, and the injunction prayed for granted.

We think it perfectly plain that the statute under construction here is wholly different not only from the statutes discussed in the Frost and Cahoon cases, but from any heretofore brought under review.

[fol. 174] This statute approaches the matter of regulation from an entirely different angle; it exerts the power of the state in an entirely different way. It presents with crystal clearness the point whether the State must choose between the alternatives of excluding private carriers altogether from its roads, or of permitting them to use the roads in the conduct of the kind of business which the State has declared must be conducted thereon.

Here is no case of compelling private carriers to become common carriers; no case of granting a right and thereafter arbitrarily or illegally conditioning that right. Here is a case of a clear, a simple, a complete declaration of policy that the public has an interest in the business of carriage for hire over the highways of the State, a prohibition of the right to engage in such business except under a franchise, and an affixing to the enjoyment of a franchise the condition that the holder must become an integral part of the transportation system of the State, and must submit to the regulations applicable to his franchise as to rates and practices.

We recognize of course that against the challenge of its validity a State statute cannot stand upon legislative declaration alone. Foster Pkg. Co. vs. Haydell, 278 U. S. 1; Ribnik vs. McBride, 277 U. S. 350; Burns Baking Co. vs. Bryan, 264 U. S. 504; Frost vs. Okla. Comm., 278 U. S. 515; Tyson vs. Banton, 273 U. S. 418; Wolf Pkg. Co. vs. Court of Industrial Relations, 262 U. S. 522; but those cases and many others clearly establish that in all the courts, and certainly in the courts of first instance, the legislative declaration of purpose and policy is entitled to gravest consideration, and unless clearly overthrown by facts of record, must prevail.

[fol. 175] The record in this case teems with evidence supporting the State's declaration of purpose and policy that the use of the highways is affected with a public interest and that the conduct of unregulated business over it is bringing about the prevalence of the mischiefs and evils which the legislation in question is designed to avoid.[4]

NOTE 4.—A considerable part of the message of the Governor to the Forty second Legislature had to do with the highways and the business done over them. It called attention to the fact that—

"Our roads are being taken and badly used by motor vehicles engaged in the transportation of passengers and freight for hire. * * * When the saving this business brings the public in the cost of its transportation is compared with the damage which the heavy freight and passenger traffic are doing the highways, it is doubtful whether

The affidavits of Railroad and Highway Commissioners, of holders of public convenience and necessity certificates, and the records of the two Commissions show an enormous increase of so-called private carriers for hire with a shrinking and dwindling away of common carriers. It was testified to without dispute, and we find, that the inevitable result of the continuance of this condition will be the disappearance altogether of the common carrier from the roads, for as matters now stand all that he gets in exchange for the tender of his services to the public under his franchise is exposure to unrestricted, unlimited, irregular and destructive competition from carriers private in name, but public in fact, who unregulated, ply their vocation along the roads, seeking business any and everywhere.[5]

Can it be justly said under these circumstances, that a state which feels that it is in the public interest to establish and maintain a correlated system of transportation, safe [fol. 176] and dependable, which all the public may rely upon and use, must not only stand powerless to do so, but must, through the extension of improved highways, furnish more and ever more facilities for the doing of business thereon by unregulated private carriers until its public carriage system has disappeared? We do not think so.

We think that the cases which have discussed regulatory statutes and the status of a private carrier under them have

---

the motor truck and motor bus business is being operated economically from the standpoint of the public."

It also called attention to the uneconomical conditions resulting from the unrestricted competition of unregulated motor trucks and the handling of freight over the highways. It said:

"If trucks and busses are to operate in competition with railroads, and at considerable damage to highway development, and if, because of the reduced business of the railroads, the public is made to pay higher railroad rates on commodities moving by rail, it is hardly possible that under such conditions the truck and bus transportation could be economically profitable to the general public."

NOTE 5.—Affidavits of F. W. Ruby, M. S. Day, L. C. Abbott, E. C. Sanders, C. E. Terrel, Chairman Railroad Commission, W. R. Ely, Chairman Highway Commission.

discussed them too much from the standpoint of that status as fixed at common law unaffected by statute, and that the overemphasis of his common law status has operated erroneously to obscure the fact that he enjoys this status not as a right, but as a privilege.

We think it perfectly plain that as he never had a right on the roads, but merely a privilege as to them, it is too much to say that when a state undertakes to impose upon him conditions different from those characterizing him at common law, his privilege flowers under the Fourteenth Amendment into a right which the state may not impair.

We think that if a state determines that the business of common carriage by rail and road may no longer, from the standpoint of public interest, be looked upon as a business entirely separate and distinct from that of contract carriage by road; that all of its available carriage services are so bound together and so interdependent that the public may not continue to have a safe and dependable system of transportation unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulations, bringing their services into relation with those of common carriers thereon, no just or valid reason exists why it may not do so.

[fol. 177] We may, in passing, notice but to reject it, the complaint that the Act is invalid because Sub. d of Sec. 6 gives the Commission authority to grant special terms to carriers of certain kinds of goods, thus working a discrimination. Of this complaint it is sufficient to say that it will be time enough to make it when rights have been infringed by action under the section. If plaintiff takes out a permit, and the Commission thereafter under authority of the section attempts unlawfully to confer a permit upon another on less onerous terms, plaintiff may then apply for relief. Frost vs. Oklahoma, 274 U. S. 719. Besides, this section is in terms made separable from the rest of the Act, and if it is invalid it, and not the Act, will fail.

In the same way we notice the argument of the intervenor Beard that the Act is unreasonably restrictive because its effect is to prohibit the casual use of roads by individuals who, not in the general business of carriage for hire, but as mere agents for another, casually haul making a charge therefor.

In our opinion the Act does not admit of such interpretation. We think it is directed at and reaches only those persons who, as complainants and intervenors do, make their living off of carriage on the roads. Besides, none of those in this case are casual carriers; they are all in it as a business. In fact there is more than a little question as to whether though the particular work they are now doing may be under private contract, they are not really common carriers since they in fact hold themselves out for all the work which they may get to do.[6] Certainly none of them is a casual carrier or in a position to complain on behalf of such carrier of hardships which the law may have imposed upon him.

[fol. 178] We do not any more agree with the intervenor Finnegan that he is an interstate carrier. His contract is made in Texas, his carriage is in Texas. Whether the goods which he is carrying have really come to rest before he picks them up; or are in the course of continuous transit, the record does not show. But if it did show the facts to be as he contends, we think it would be a straining of the point to say because the goods he handles intrastate have come from outside of it, that the requirement that this carrier who contracts wholly in Texas, and who carries wholly there, procure a permit to do so and submit himself to the regulations which the state requires constitutes a burden on interstate commerce.

This case comes at last to the one great question, whether those engaged generally in the unregulated business of the carriage of goods for hire may, merely because they carry usually for single individuals, and upon special terms, by invoking the Fourteenth Amendment maintain the right to continue to do such business on the public roads, against the will of the State asserted by statute that they shall not do so.

We think the question admits of only one answer, that the requirements of the Texas statute are valid, and that if plaintiff and intervenors wish to conduct their business on the highways of this State, they must comply with them.

Note 6.—"Regulation of the Contract Motor Carrier under the Constitution," Harvard Law Review, Vol. XLIV, No. 4, p. 536. Motor Carrier Regulation, Federal, State and Municipal," Columbia Law Review, Vol. 26, pp. 963-964.

So believing, we deny the temporary injunction prayed for.

West, District Judge, concurs.

IN UNITED STATES DISTRICT COURT

DISSENTING OPINION—Filed Oct. 26, 1931

KENNERLY, District Judge, dissenting:

In what is said respecting those Regulations contained in the Legislative Act (House Bill 335), which concern traffic safety and highway protection, I fully concur. McLeaish [fol. 179] vs. Binford, — Fed. (2d) —; McLeaish vs. Binford, — Fed. 2d —; Sproles vs. Binford, — Fed. (2d) —, and cases there cited.

I cannot, however, see my way clear to concur in the disposition made of the questions raised and presented by Complainant and Intervenors (who are I think clearly Contract Carriers or Private Carriers, and not Common Carriers) respecting those regulations in the Act which in no real sense concern traffic safety and highway protection, but are in fact a regulation of the business, and a restriction of the right to contract, of the Contract Carriers. I think there is no material difference in legal effect between the Michigan, Washington, California and Florida Acts, and this Act, and that Michigan v. Duke (266 U. S. 571), Buck v. Kuykendall (267 U. S. 314), Frost v. Commission (271 U. S. 583), and Smith v. Cahoon (283 U. S. 553), are controlling. I think the Temporary Injunction prayed for, restraining the enforcement of the last named regulations should be granted.

[File endorsement omitted.]

[fol. 180] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF INTERVENTION OF B. E. ITES, V. C. BILBO, J. T. CARROLL, AND A. S. ROBINSON—Filed November 23, 1931

Now come B. E. Ites, a resident citizen of Houston, Harris County, Texas, V. C. Bilbo, J. T. Carroll and A. S.

Robinson, all resident citizens of Dallas, Dallas County, Texas, on their own behalf and on behalf of and as representatives of all contract carriers residing and doing business in the State of Texas, all of whom belong to the same general class of residents and citizens of the State of Texas who are engaged in business as contract carriers by motor truck over the highways in the State of Texas, as do the intervenors referred to by name herein and the original complainant herein, and to whom and to said intervenors referred to by name herein, and to the original complainant herein, the questions and matters at issue in the above entitled and numbered suit are of a common, general and mutual interest, and on behalf of all such other persons as have an interest herein and may by proper proceedings become parties hereto, and leave having been granted to them to intervene herein and to file this original petition of intervention, and represent to the court that they are interested in the questions and matters in litigation in the above entitled suit, and that their interests in said questions and matters are common and general with the complainant in this suit and they desire to intervene herein and make themselves parties complainant herein, and in support of their complaint in intervention, would with respect state and allege to the court as follows:

I

That at and during all the times referred to hereinafter [fol. 181] and in the original bill of complaint herein filed by J. H. Stephenson, intervenor B. E. Ites was and still is a resident citizen of Houston, Harris County, Texas and intervenors V. C. Bilbo, J. T. Carroll and A. S. Robinson were and still are resident citizens of Dallas, Dallas County, Texas; that all of said intervenors were, prior to the effective date of House Bill No. 335 passed by the 1931 Legislature of the State of Texas, engaged in the business of transporting commodities in trucks belonging to them, over the highways of the State of Texas, as contract carriers, and in such capacity alone. Hereinafter, in certain portions of this intervention, the foregoing named intervenors will be as a matter of convenience and simplicity referred to by their individual names, but when so done, it is expressly intended thereby and will be understood thereby to refer to said intervenors—not only in

their respective individual capacities, but also in their representative capacity of the class of persons for whom they intervene herein.

II

That intervenors file this petition of intervention and maintain this suit on their own behalf and, as authorized by Equity Rules Nos. 37 and 38 of the Supreme Court of the United States, on behalf of and as representative of all persons engaged in the transportation and carriage of commodities over the highways of the State of Texas as contract carriers and which said parties are resident citizens of the State of Texas, all of whom belong to the same general class of resident citizens of the State of Texas who are engaged in the business of transporting commodities over the highways of the State of Texas, as contract carriers, as is the original complainant herein, and intervenors referred to by name herein, and to whom and to said original complainant herein and to said intervenors referred to by name herein, the questions and matters at issue in the above entitled suit are of common, general and mutual interest, as well as on behalf of all others as are or may be similarly situated, and on behalf of all other persons who may elect to associate themselves with complainant and/or these intervenors.

The other and additional persons on whose behalf this suit [fol. 182] is brought and who are not hereinabove specifically called by their names, run into the hundreds in number, but the exact number and their identity are so subject to fluctuation and change that it would be impossible, or practically so, to make all of them parties by name, and it is impracticable to bring all of them before the court by name. Said intervenors specifically named herein fairly represent the rights and interests of those in whose behalf they bring and prosecute this petition of intervention.

That intervenors B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson, and all other contract carriers on whose behalf they prosecute this complaint of intervention were, prior to the effective date of said House Bill No. 335 passed by the 1931 Legislature of the State of Texas and which became a law on or about August 22, 1931, engaged in the carriage of commodities over the highways of the State of Texas, in trucks belonging to them, said car-

riage being conducted under private contract, and that each of said intervenors operated his said truck or trucks over the highway- of the State of Texas solely and exclusively as a contract carrier; that each of said intervenors holds a contract, either verbal or written, specifying the rates to be paid him, the character of service to be rendered, the term thereof and other matters common to an agreement for transportation of commodities by motor truck carrier. That by reason of said House Bill No. 335 and which became a law of the State of Texas on August 22, 1931, hereinafter more particularly referred to, intervenors have been prohibited from transporting said commodities they have been heretofore carrying under their respective said contracts, over the highways of the State of Texas, and that they and each of them has been denied the use of the highways of the State of Texas, in pursuit of their respective contracts and have been compelled to discontinue the further pursuit of their business and carrying out of their contracts, and under the terms and provisions of said Act, any effort on their part to continue the transportation of said commodities under said contract is a violation of the Penal Laws of the State of Texas; and that intervenors, their servants and employees have been ordered to discontinue and abandon all further operations as contract carriers and have been ordered to not make further use of the highways of the State of [fol. 183] Texas, in the furtherance of said transportation agreements, and have been ordered to desist from any and all operations over the highways of the State of Texas as contract carriers, with the threat and admonition that any violation of said order would result in intervenors, their agents, servants and employees being arrested and prosecuted and subjected to the infliction of severe fines and penalties, and that intervenors are at this time threatened with arrests and prosecutions should they attempt to operate their said trucks as contract carriers over the highways of the State of Texas, and will be arrested and prosecuted and fined if they should undertake to so operate, unless this Honorable Court will give them the relief hereinafter prayed for.

III

Intervenors complain of the respondents named in the first paragraph of the original bill of complaint filed herein, which said paragraph is unnumbered but sets out the name, official position and residence of each of the respondents, and here and now adopt, approve, ratify, re-allege and confirm each and all of the allegations, matters and things set forth and contained in said paragraph of said original bill of complaint heretofore filed herein as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

IV

Intervenors here and now adopt, approve, ratify, re-allege and confirm each and all of the allegations, matters and things set forth and contained in Article I of the original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

V

Intervenor Ites avers that since the year 1929 he has been engaged in the business of operating motor trucks as a contract carrier; that on April 4, 1931, he entered into a [fol. 184] contract with Herrin Transfer & Warehouse Company, with headquarters at Houston, Harris County, Texas, under the terms of which he was to haul by motor truck miscellaneous merchandise for said Herrin Transfer & Warehouse Company, out of Houston, Harris County Texas, to other points in the State. Immediately after said contract was consummated, intervenor Ites commenced his operations in pursuit of said agreement and bought such equipment as was necessary for him to properly comply with the conditions and provisions thereof. That under the terms of said agreement, he was bound and obligated to make immediate transportation of such commodities as said Herrin Transfer & Warehouse Company had ready for shipment. That he continued to operate under said contract

until August 22, 1931, the effective date of House Bill No. 335 passed by the 1931 Legislature of Texas, and hereinbefore more fully set out by adoption, and that on said date Herrin Transfer & Warehouse Company notified this intervenor that by reason of the provisions of said House Bill No. 335, it was compelled to cancel and annul the contract and agreement had with this intervenor. That the terms of the contract entered into by and between said Herrin Transfer & Warehouse Company and this intervenor stipulated that all commodities carried by intervenor should be transported at a flat rate of sixty-five cents per hundred pounds and that this flat rate should apply to every hundred pounds so carried by intervenor, whether the same be a commodity falling within the first class or fourth class, as per classification made by the Railroad Commission. That the commodities carried by intervenor under this contract consisted of many different kinds of merchandise ranging from first class commodities to fourth class commodities, as per classification made and used by the Railroad Commission of Texas. That on the effective date of said House Bill 335, when said Herrin Transfer & Warehouse Company cancelled the contract this intervenor had with it, said Herrin Transfer & Warehouse Company notified intervenor that the contract was cancelled because of the fact that any future operation by this intervenor for Herrin Transfer & Warehouse Company would constitute a violation of the law and would subject both intervenor Ites and said Herrin Transfer & Warehouse Company to prosecution and the assessment of fines and penalties because, firstly intervenor [fol. 185] did not then possess a permit granted by the Railroad Commission of Texas in accordance with the requirements of said Acts, and secondly, even though he had such a permit he could not continue to transport said commodities at a flat rate of sixty-five cents per hundred pounds, in that such a rate was less than the minimum prescribed by the Railroad Commission as the rate to be charged by common carriers for the transportation of said commodities and by reason thereof, intervenor, as a contract carrier, under the terms of said Act, could charge no less than the minimum prescribed for common carriers. Said Herrin Transfer & Warehouse Company further advised this intervenor that because of said Act having become a law and by reason of its enforcement, said Herrin Transfer & Warehouse Com-

pany could no longer afford to continue the contract in force and effect and permit intervenor to carry commodities for it pursuant thereto, lest said Herrin Transfer & Warehouse Company be also prosecuted and fined under the terms of said Act.

VI

Intervenor Ites would further show unto the court that prior to the effective date of said House Bill No. 335 enacted by the 1931 Legislature of Texas, he was not possessed of a "Class B Permit" and there was no occasion or necessity for him to then have such a permit as he did not fall within the category of those motor truck operators required to have a "Class B Permit" under the law then in effect. That under the law in effect prior to August 22, 1931, he was not compelled or required to have any character of permit or certificate in order to operate his said trucks over the highways of the State of Texas in pursuance to said contract he held with Herrin Transfer & Warehouse Company. That all other laws then in force and effect and relating to the operation of trucks over the highways of the State of Texas were fully complied with by this intervenor. That under the terms of said House Bill No. 335 this intervenor was forced and compelled to immediately cease and abandon all operations as contract carrier and any attempt on his part to continue to operate under said contract he held with Herrin Transfer & Warehouse Company as he had done prior to August 22, 1931, constituted a violation of the law and subjected him to severe fines and penalties.

VII

Intervenor Ites would further show unto the court that [fol. 186] he did not then make an application for a contract carrier's permit to the Railroad Commission of Texas as is provided for under the terms of said House Bill No. 335, and that he has not until this date filed application for said contract carrier's permit. That he did not make said application for a contract carrier's permit, nor did he take any steps in the direction of obtaining such a permit because he felt it absolutely useless and futile to so do after having observed hearings held by said Railroad

Commission and having been advised of the rules promulgated by said Railroad Commission, all of which will be hereinafter more fully set out. In this connection, intervenor Ites alleges that even though he had made an application for a permit and the Commission would have held an immediate hearing thereon and would have granted him a contract carrier's permit, he still would not have been in position to further pursue the contract he held with Herrin Transfer & Warehouse Company and to operate his said trucks over the highways of the State of Texas in furtherance thereof, for the reason that the rates he was charging and had agreed to take and receive for his said transportation services were less and below the rates he is compelled to charge and receive under the terms and provisions of said House Bill No. 335, and that any acceptance on his part of a sum of money less than the rates fixed by said Railroad commission for said transportation services would constitute a violation of the law and subject him to severe fines and penalties. For these reasons, this intervenor made no application for a contract carrier's permit and has had to cease all operations of his said trucks over the highways of the State of Texas.

VIII

Intervenor Ites further alleges that although his said contract with Herrin Transfer & Warehouse Company has been cancelled by the latter because of intervenor's failure to have a permit and because of the Mandate contained in said Act with reference to the rates to be charged for said transportation services, said Herrin Transfer & Warehouse Company would again enter into a similar contract with intervenor if he was not bound and compelled by the laws of the State of Texas to have a permit and to charge [fol. 187] certain rates prescribed by the Commission before he was lawfully operating over the highways of the State, and that if it were not for these two provisions of said House Bill No. 335, said Herrin Warehouse & Transfer Company would permit intervenor Ites to resume his operations as a contract carrier of commodities shipped by said Herrin Transfer & Warehouse Company to points in the State of Texas.

In this connection, intervenor Ites desires to show unto the court that he has made strict compliance with each and

every provision of said House Bill No. 335 pertaining to the carrying of policies of insurance and has likewise made compliance with the provisions thereof relating to the obtaining of licenses for the drivers of his trucks, and that in every particular and respect has he complied with said House Bill No. 335, except those portions thereof relating to the obtaining of a permit and that because of the terms of said contract with Herrin Trsnsfer & Warehouse Company, he cannot submit to the rates promulgated by said Railroad Commission.

IX

Intervenor further alleges that after the consummation of said aforementioned contract with Herrin Transfer & Warehouse Company, he purchased two new Chevrolet trucks, with semi-trailer, representing an investment of Three Thousand Dollars, which said trucks and equipment he purchased for the purpose of properly and adequately carrying on the transportation services he agreed to render in said contract. That it was necessary for intervenor to purchase said trucks on time and a considerable portion of the purchase price of each of said trucks was evidenced by the execution of notes covering same, and said indebtedness was secured through the execution of a chattel mortgage on said trucks by intervenor. That the balance of the purchase price of said trucks was being paid by intervenor in monthly installments of approximately Two Hundred and Three Dollars on both trucks and that there remains at this time a balance of Eleven Hundred Dollars, which under the terms of said notes is now due and owing; that intervenor is now in arrears one payment in the sum of Two Hundred Three Dollars and that he has been notified by the holder of said notes and chattel mortgage that un- [fol. 188] less he would be in position to meet said payments of Two Hundred and Three Dollars per month promptly and would pay the amount in arrears within the next few days, said trucks would be repossessed in the manner provided for in said chattel mortgage and taken back in cancellation of the indebtedness against them. In this connection, this intervenor says that he was meeting said notes representing the purchase price of said trucks out of moneys he received under the contract he had with Herrin Transfer & Warehouse Company, and that he is

now wholly unable to continue the payments already due and coming due on said trucks, unless he can resume the operation of his trucks under the contract he once held with said Harris Transfer & Warehouse Company.

Intervenor further says that he has a considerable equity in both of said trucks and that unless he can resume the operation of his trucks over the highways of the State of Texas under and pursuant to said contract he once held with said transfer company, he will lose all of the equity he now has in said trucks and equipment. That there is no market for second-hand trucks at this time and that although he has diligently endeavored to sell said two trucks so as to save and realize even a small amount of this equity, he has been unable to effectuate a sale thereof; that he has no means or resort whereby he can arrange to retain possession of his trucks through refinancing the indebtedness against same, nor has he any source from whence to obtain money sufficient to take care of the installments past due and coming due, and unless given relief by this Honorable Court, will have to surrender and lose his said trucks and equipment. In this connection, intervenor would show that he was having a gross income of approximately Four Hundred Dollars a month as a result of his said operations as a contract carrier under said contract with Herrin Transfer & Warehouse Company, and that this income was sufficient to provide him with a means of support for himself and family, and permitted him to meet his obligations and his payments on said trucks with promptness, but that since said House Bill No. 335 went into effect, causing the cancellation of his said contract with said transfer company, affiant's income has been entirely cut off and terminated and that since said date he has been unable to provide for himself and family and has been [fol. 189] unsuccessful in gaining employment of any kind or character, and not only is intervenor faced with the proposition of losing his entire investment made in said trucks and equipment, but with the complete destruction of his entire and sole income, and though he has striven in every possible manner to minimize this loss he has been utterly unable to do so. That had it not been for said House Bill 335 becoming a law of the State of Texas on August 22, 1931, intervenor would have continued to make his gross

income of Four Hundred Dollars a month for the remainder of the year 1931, and could make an income of that amount at this time if allowed to resume his said operations. That the losses intervenor will sustain in investment made, as well as income deprived of, if not permitted to resume his operations, well exceed the sum of Three Thousand Dollars, exclusive of interest and costs, and arise under the Constitution of the United States of America and the Amendments thereto, all of which will be hereinafter more fully shown.

X

Intervenors Bilbo, Carroll and Robinson allege that for a period of about four or five years next preceding the effective date of House Bill No. 335, they were each engaged in the operation of a number of trucks as contract carriers, in pursuit of an agreement they each had with the Great Atlantic & Pacific Tea Company, under the terms of which intervenors transported from the general warehouse of the Great Atlantic & Pacific Tea Company, hereinafter referred to as A. & P. Company, to its branch stores in the State of Texas, and within a radius of two hundred and thirty miles from Dallas, Dallas County, Texas; that such transportation included merchandise, supplies and commodities of every kind and character handled by the various retail stores of the A. & P. Company. That all of said intervenors operate as contract carriers exclusively pursuant to their agreement with said A. & P. Company and under an agreed schedule of rates. That intervenors Bilbo operated approximately eighteen trucks and had in his employ about thirty-five or forty men in connection with his operation as a contract carrier under said agreement with said A. & P. Company. That intervenor J. T. Carroll operated about twenty-three trucks as a contract carrier, in pursuance of said agreement with said A. & P. Company and had in his employ about thirty-five men as drivers of [fol. 190] said trucks, and that intervenor A. S. Robinson operated about two trucks and employed two drivers in connection with the carrying out of his said agreement with said A. & P. Company.

Said intervenors Bilbo, Carroll and Robinson allege that in 1929 they applied for and received a "Class B Permit" from the Railroad Commission. That in the year 1930 the

Railroad Commission advised them that their operations came clearly within the classification of a contract carrier and that they did not need a permit, and requested of them to send in all permits, tags and other evidences of their "Class B Permits" and for them to continue to operate as a contract carrier. That each of said intervenors complied with said request of said Railroad Commission and surrendered their said "Class B Permits". That thereafter intervenors continued to operate their said trucks without a "Class B Permit", but purely as a contract carrier, until August 22, 1931, the effective date of House Bill No. 335 and that just prior to the time said House Bill No. 335 became a law, intervenors had a conversation with a Mr. Miller, Inspector for the Railroad Commission, and Mr. Miller ordered and instructed intervenors and each of them to desist and refrain from conducting any operations as a contract carrier over the highways of the State of Texas after August 22, 1931 and to continue to cease such operations until they had been granted a permit by the Railroad Commission under the terms and provisions of said House Bill No. 335 and further advised and informed intervenors and each of them that any effort on their part to conduct their operations in violation of his said orders and instructions would result in their being arrested, prosecuted and subjected to the infliction of a severe fine and penalty. That after receiving said orders and instructions from Inspector Miller, said intervenors abandoned and ceased all operations of their said trucks over the highways of the State of Texas and immediately took steps to obtain a permit from the Railroad Commission under said House Bill 335. That their said applications were made in absolute conformity with the manner and form as provided by said Act and were accompanied with the requisite fee, and that [fol. 191] the receipt of their said applications was acknowledged in writing by said Railroad Commission and intervenors were notified that a hearing on their applications was to be held at Dallas on November 3, 1931.

That intervenors were prepared to present their said applications on said date and to offer proof in support of their right to obtain such permits, but because of the request made by an attorney representing a common carrier who was desirous of contesting intervenors' application for permits, the Commission continued the hearing and deferred

it until a future date, all of which was done without the consent of intervenors or their attorney. That thereafter intervenors were advised by one of the members of the Railroad Commission, namely, Commissioner Neff, that if they would appear in Waco the following week their said applications might be reached for hearing, and although intervenors went to Waco the following week for the purpose of presenting their applications, they received no hearing. From Waco, one of the Commissioners and Mr. Marshall who held some of the hearings and who is Chief of the Transportation Division of the Railroad Commission of Texas, returned to Austin, Texas, and although intervenors followed them to Austin and attempted to obtain a hearing, they received none, but were advised that perhaps their said applications might be reached at Dallas at a later date.

XI

Intervenors Bilbo, Carroll and Robinson allege that the large investment they have in the number of trucks they operated pursuant to their said agreements with the A. & P. Company, is now practically a total loss to them, by reason of the fact that there is no market for second-hand trucks, and said intervenors, by reason of said loss together with the enormous loss they are suffering by reason of being without a means of income, have each sustained a loss of thousands of dollars, and more particularly well in excess of the amount of Three Thousand Dollars to each of said intervenors, by reason of all of which the matter in controversy in their said respective interventions, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars and arises under the Constitution of the United States of America and the Amendments thereto all of which will be hereinafter more fully shown.

[fol. 192] XII

Intervenors here and now adopt, approve, ratify re-allege and confirm each and all of the allegations, matters and things set forth and contained in Article VI of the original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be incon-

sistent with the allegations, matters and things set forth and contained in this petition of intervention.

XIII

Intervenors here and now adopt, approve, ratify, re-allege and confirm each and all of the allegations, matters and things set forth and contained in Article VII of the original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

XIV

Intervenors here and now adopt, approve, ratify re-allege and confirm each and all of the allegations, matters and things set forth and contained in Article VIII of the original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

XV

Intervenors here and now adopt, approve, ratify re-allege and confirm each and all of the allegations, matters and things set forth and contained in Article IX of the original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

In connection with said Article IX of the original bill of [fol. 193] complaint herein, intervenor Ites alleges, as heretofore shown, that the rates he charged and received for his transportation services were less than the minimum rates prescribed and promulgated by the Railroad Commission of Texas for said transportation services, and that intervenors Bilbo Carroll and Robinson have been charging and receiving approximately the same rates as the minimum rates prescribed by the Railroad Commission of Texas for common carriers.

XVII

Intervenors here and now adopt, approve, ratify, re-allege and confirm each and all of the allegations, matters and things set forth and contained in Articles XIV and XV of the complaint in intervention heretofore filed herein by intervenors Finnegan and Arnett, as fully as though set forth at length herein and reiterated herein, except such specific allegations matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention.

XVIII

Intervenors here and now adopt, approve, ratify, re-allege and confirm each and all of the allegations, matters and things set forth and contained in Article XII of the original bill of complaint heretofore filed herein, as fully as though set forth at length herein and reiterated herein, except such specific allegations, matters and things as may be inconsistent with the allegations, matters and things set forth and contained in this petition of intervention, and as to such matters not inconsistent with specific allegations herein contained, intervenors further say the same are equally as applicable to them as to complainant.

XIX

As has been hereinabove set out, intervenor Ites alleges that he did not make an application to the Railroad Commission of Texas for a contract carrier's permit as is required by said House Bill 335, for the reason that even though a permit would be granted to him, he would still be charged with a violation of the law because of the rates he contracted for in said agreement with Herrin Transfer & Warehouse Company being in a less amount than the minimum prescribed by the Railroad Commission of Texas, for substantially the same service. In this connection, intervenor Ites desires to show to the court, however, that even though he [fol. 194] would have been in position to adjust the matter of rates so as to fully comply with the provisions of House Bill 335 pertaining thereto, he would still not have made an application for a contract carrier's permit because of his firm belief and opinion that by reason of the pronounce-

ments, actions, rulings and regulations promulgated by the Railroad Commission of Texas, he had practically no chance to obtain such a permit. That by reason of the oppressive, burdensome and drastic regulations, rules and the general modus operandi adopted and employed by said Railroad Commission in conducting the hearings on applications made for contract carrier permits, intervenor as an applicant, would have been placed at such a decided disadvantage at the very outset to where the chances of obtaining a permit would have been very remote. That intervenor Ites attended the early sessions of said Railroad Commission for the purpose of determining whether it would be advisable and beneficial to make application for a permit and that after observing said Commission in action on two or three of the hearings and after becoming advised of their different rules and pronouncements, which will be hereinafter more fully set out, intervenor Ites concluded that it would be a waste of time and money on his part to seek such permit.

In this connection, intervenor would show unto the court that among the rulings and pronouncements made by said Railroad Commission were the following:

"(a) That an applicant for a contract carrier's permit must set out in his application in detail every single highway over which he proposes to operate in the furtherance of his business as a contract carrier and pursuant to any contract he might hold, and this, irrespective of the fact that a contract then held by the applicant may be of such a character and contain such conditions and provisions as to make it impossible for said applicant to determine what particular highways he might be required to traverse in the carrying on of said transportation services under said contract because of his inability to foresee and foretell to what points the shipper with whom he holds said contract might be required to ship commodities. The Commission further ruled in this connection that as to said highways the applicant intended to traverse, he must also set out in his application the character of said highways, even though at the time he makes his application he has no possible way of knowing whereto the shipper with whom he has contracted might have to ship commodities in the future. It was further ruled by the Commission that the applicant

must designate every town to which he proposes to operate in the execution of any specific contracts he might hold, and further, that said applicant must designate every person in such towns that he proposes to serve.

[fol. 195] (b) That said applicant for a contract carrier's permit must show in his application the exact commodities which he proposes to carry and which his contracts require him to carry.

(c) That the burden of proof rested upon the applicant for a contract carrier's permit to show that the service he proposed to render for the shippers with whom he had a contract would not impair the efficiency of the service of common carrier trucks or railroads then adequately serving substantially the same territory.

(d) That the portion of said House Bill No. 335 reading "No application for permits shall be granted by the Commission until after a hearing, nor shall any such permit be granted if the Commission shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory" applied to railroads and interurbans with equal force and effect as it did to common carrier motor carriers.

(e) That in an effort to offset contentions made by an applicant for a contract carrier permit that his proposed service would not impair the efficient public service of a common carrier the railroads could introduce, and the Commission would consider, testimony showing that over a period of years their revenues had decreased materially.

That because of said rules and regulations, intervenor Ites well knew it would be futile for him to attempt to obtain a contract carrier's permit, in that he would be called upon to discharge a burden wholly beyond his ability, namely that of showing that his proposed service would not impair the efficient public service of a common carrier serving the same territory, because all matters of evidence and proof available to discharge such a burden are of necessity peculiarly within the knowledge and within the exclusive possession of the common carriers serving said territory, and

intervenor, as an applicant, could not offer to said Commission such proof.

Intervenors Bilbo, Carroll and Robinson likewise allege that by reason of the promulgation of said rules and regulations aforementioned, it is extremely doubtful that even after their said applications for contract carrier permits are reached for a hearing, the Railroad Commission will grant to them a permit, for the reason that said Commission will likely hold that intervenors have not brought themselves within the purview of said rulings and regulations and that if said Railroad Commission applies said rules and regulations to the applications made by said intervenors as it has done to other applicants heretofore, as intervenors believe it will do, then said Commission will in all probability deny intervenors said applications for [fol. 196] permits.

In this connection all of the intervenors herein desire to show unto the court that although said Railroad Commission has held some hearings, almost three weeks ago, it has as yet not ruled on said application and the applicants have received no relief, nor been placed in position to where they could obtain relief in the courts of this State after a denial of same by the Commission.

That there have been a great number of applications filed, which intervenors believe to be about Fifteen Hundred in number, and that according to the present rate of progress made by said Commission in conducting said hearings, it will take said Commission months and months to complete the hearings of the applications, not mentioning the many months it will take for said Commission to finally pass upon said applications.

In this connection, intervenors desire to show to the Court that at each of said hearings held by the Railroad Commission of Texas, on any of said applications made, there is always present an array of attorneys representing the various railroad interests doing business in Texas, as well as interurban interests and common carrier motor carrier interests, and that through the combined efforts of the various attorneys representing said many interests, a vigorous and stubborn attack is launched against every application for a contract carrier permit, and that it is the policy of these interests to attack and seek a denial of every

single application made, thus forcing each applicant and these intervenors to obtain sufficient counsel in an effort to combat the efforts of these interests, and that this requires a considerable expenditure for attorneys' fees, as well as other expenses incidental and necessary to a proper presentation of said application.

Wherefore, premises considered, intervenors pray the court to make and cause to be entered an order permitting them to file this their bill of intervention, and to associate themselves with the complainant herein as complainant-intervenors; that they be permitted to maintain and prosecute this suit to a full and final effect in conjunction with and association with the original complainant herein, and [fol. 197] especially pray for all the relief prayed for and referred to in complainant's original bill of complaint herein; that the respondents herein be required to answer this petition of intervention; and that upon hearing of this cause, said Act, in so far as the same relates to intervenors' right to transport commodities as private carriers over the highways of the State of Texas, in pursuit and fulfillment of their respective said contracts, be declared invalid; that respondents and each of them, their successors, deputies and employees, and those under their control, as well as all other Peace Officers of the State of Texas, and any subdivision thereof, whose duty it is to make arrests for the violation of the Act complained of herein, and all officers of the State and any subdivision thereof whose duty it is to prosecute complaints filed for the violation of the Act complained of, be perpetually enjoined from molesting, arresting, filing complaints or charges against or prosecuting intervenors or any of their employees, for violation of said Act in the operation of their motor trucks and transportation of commodities as hereinabove set out, and from taking any steps towards molesting or arresting or filing charges or complaints against intervenors, their agents, servants or employes, for failure to comply with said Act and each of the respective sections thereof.

Intervenors pray that in order to prevent irreparable injury to them and to fully protect them in the pursuit of their business during the pendency of this suit, this Honorable Court immediately issue a temporary injunction,

enjoining and restraining said respondents, their successors, deputies and employes, and all other persons charged under the laws of the State of Texas with the enforcement of said Act, known as House Bill No. 335, and that respondents and each of them and all of their respective officers, agents, appointees, employes, servants and representatives, the State Highway Patrol Officers, or their successors in office and all other persons charged under the laws of the State of Texas with the enforcement of this Act, be temporarily restrained from doing any and all things purporting to be authorized and warranted by said Act, in so far as the same relates to intervenors, and that said temporary restraining order may remain in force until the time of the hearing and determination of intervenors' application herein made, for a preliminary injunction enjoining the respondents as herein prayed for and intervenors hereby ap-
[fol. 198] ply for a preliminary injunction and pray that same be granted against each and all of said respondents, their employes, agents and representatives or successors in office and intervenors pray that upon final hearing said injunction may be made perpetual and permanent and the provisions of said Act herein complained of be held to be in conflict with and contrary to the Constitution of the United States, and that said Act be declared void as depriving intervenors of their property without due process of law and as depriving intervenors of the equal protection of the laws.

Intervenors further pray that they be granted such other and further relief, in law or in equity, as they may be entitled to, and that they recover from respondents all costs herein expended, for all of which they will ever pray.

Intervenors would further show unto the court that they are fully cognizant of this Honorable Court's opinion and decision filed in this cause, denying to the original complainant herein J. H. Stephenson, and intervenors Finnegan and Arnett a temporary injunction prayed for by them in said original bill of complaint and complaints in intervention, and that in the event this Honorable Court is of the opinion that intervenors herein but present the same questions, matters and issues determined by the Court at the time it ruled on the application of Stephenson and inter-

venors Finnegan and Arnett for a temporary injunction, and is further of the opinion that the application of intervenors herein for said temporary injunction should be in all things denied, and should this Honorable Court enter an order to that effect, then intervenors herein respectfully pray that this Honorable Court enter an order suspending and restraining the operation and enforcement of said House Bill No. 335 passed by the 1931 Legislature of Texas in so far as the same requires intervenors to obtain a permit before they can lawfully operate as contract carriers over the highways of the State of Texas, and in so far as said Act gives the Railroad Commission of Texas the right to prescribe the rates intervenors as contract carriers are entitled to charge and receive as compensation for their transportation services during the time this cause is being appealed from the ruling and decision of this Honorable Court to the Supreme Court of the United States, and in [fol. 199] the event of such a ruling and order on the part of this Honorable Court denying these intervenors a temporary injunction, and only in the event thereof, intervenors here and now respectfully apply to this Honorable Court for an order suspending and restraining the operation and enforcement of said House Bill No. 335, in so far as the same requires the obtaining of a permit before a contract carrier can lawfully operate over the highways of the State of Texas, and in so far as it authorizes the Railroad Commission to prescribe the minimum rates such contract carrier can charge for his transportation services, during the time this cause is being appealed from the ruling and decision of this Honorable Court to the Supreme Court of the United States and in support of said application would respectfully represent and show;

Intervenors represent unto the court that, as is well known to this Honorable Court, the decision denying the temporary injunction prayed for by J. H. Stephenson and intervenors Finnegan and Arnett was a two-to-one decision of this Honorable Court, and intervenors most respectfully submit that because of past expressions and pronouncements made by the Supreme Court of the United States, it is not at all certain that the Supreme Court of the United States will follow this Honorable Court in its disposition of this matter, but that said Supreme Court of the United States will hold as is believed by Justice Kennerly of this

Honorable Court namely, that the decisions of said court in the cause of Michigan v. Duke, 266 U. S. 571, Buck v. Kuykendall, 267 U. S. 314, Frost v. Railroad Commission, 271 U. S. 583, and Smith vs. Cahoon, 283 U. S. 553, are controlling of the questions here presented, and that by reason thereof said Act is unconstitutional and the original complainant herein as well as all intervenors, including these intervenors, are entitled to a temporary injunction.

In this connection, intervenors allege that in the event the Supreme Court of the United States should decree that this Honorable Court erred and that said Act is unconstitutional, and that intervenors should be granted a writ of injunction, said decision will be of but little value to these intervenors and will not in anywise or manner redress or alleviate the great and material damage they will have suffered through the enforcement of said House Bill 335 from the present time until the Supreme Court of the United [fol. 200] States will pass upon this case. That this Honorable Court well knows that even though the Supreme Court of the United States should consent to an advancement of submission of this cause, that it will be at least a period of from two to three months before this cause is finally heard and decided, and that the enforcement of said House Bill 335, insofar as it requires a permit for contract carriers and prescribed the minimum rates for transportation services of such contract carriers, the same to be in no wise less than the minimum rates charged by common carriers, will so destroy and annihilate intervenors, business and cause them to suffer so greatly in the loss of their investments as to produce great and irreparable injury and damage to these intervenors, and will occasion such a complete destruction of their said business of transporting as contract carriers so as to render same impossible of revival. That if intervenors are now now granted relief by this Honorable Court, their said contracts forming the basis of their operations as contract carriers will be definitely lost and their rights thereunder annulled, and the fact that the Supreme Court of the United States might at a future date decree that intervenors were entitled to operate under said contracts, notwithstanding the provisions of House Bill 335, would not regain or reinstate for intervenors said contract rights. That unless they be permitted to continue their operations pursuant to said contracts the parties with whom

they have contracted will make other arrangements for the transportation of commodities they desire to have carried, and their shipping program will have been so readjusted in the interim as to render it fairly certain that intervenors could not again obtain said transportation business. Intervenors desire to show that aside from losing their rights under the contracts they now hold, they are confronted with a sudden abrogation of their source of income, and although they have diligently tried, have been unable to gain any employment or enter into any other business ventures. That they are face to face with the proposition of losing their equipment and of being wholly deprived of the large investment they have made in said equipment, and as has been heretofore pointed out, there is no market for such equipment at this time so as to permit of a sale thereof. Intervenors have spent the past several years in the business of transporting as a contract carrier, and during said years have worked and toiled faithfully and resourcefully in [fol. 201] building up their respective said business to its present status, and if granted no immediate relief, they will be compelled to submit to an absolute ruination of their said business, and should the Supreme Court of the United States then hold that said House Bill 335 was violative of and offensive to the Constitutional rights and guaranties of these intervenors and that intervenors are entitled to operate as contract carriers without being subjected to said regulations of House Bill No. 335 their cause has not been helped, for the business ruins they will have sustained will not be subject to a reconstruction. Any relief then given will be meaningless and empty and too late to save the investment and the business of these intervenors from perdition.

Wherefore intervenors respectfully pray of the court that in the event this Honorable Court should feel that an order denying the prayer for a temporary injunction should be entered as to these intervenors, as was done in this cause as to the original complainant and intervenors Finnegan and Arnett then and in that event only, intervenors pray that this Honorable Court enter an order, suspending and restraining the operation and enforcement of said House Bill 335 passed by the 1931 Legislature of Texas and which became a law on August 22, 1931, insofar as the same requires of intervenors a permit before they can operate their

motor trucks over the highways of the State of Texas as a contract carrier and in so far as the same vests the Railroad Commission with power and authority to prescribe the rates intervenors, as contract carriers could charge and receive for their transportation services, during the time that this cause is being appealed to the Supreme Court of the United States and during the time the same is pending in the Supreme Court of the United States, and before review

and decision, and that said order of suspension and restraint further recite that as to said aforementioned particulars said House Bill 335 be not enforced against intervenors until the Supreme Court of the United States has finally passed upon this cause—said order of the Court to be conditioned on intervenors diligently prosecuting their said appeal to the Supreme Court of the United States.

Fulbright, Crooker & Freeman, Franklin & Blankenbecker, Attorneys for Intervenors.

[fol. 202] *Duly sworn to by Leon Jaworski et al. Jurats omitted in printing.*

[fol. 203] [File endorsement omitted.]

[fol. 204] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESPONDENTS' ANSWER TO INTERVENTION OF V. C. BILBO, J. T. CARROLL, B. E. ITES, AND A. S. ROBINSON—Filed August 16, 1932

Now come the respondents, T. Binford, O'Brien Stevens, R. J. Martin, J. R. Wright, Jesse E. Martin, Walter Prichard, J. M. Faulkner, Cone Johnson, W. R. Ely, E. K. Martin, L. G. Phares, R. V. Abernathy, James V. Allred, and R. S. Sterling, and, answering the intervention of B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson, said respondents say:

I

For answer to the unnumbered paragraph and to paragraph I of said intervention respondents deny that the in-

tervenors herein are contract carriers as alleged by them or that they carry in that capacity alone.

II

For answer to paragraph II of said intervention, respondents say that they are uninformed as to what trucks or vehicles are operated by the intervenors or as to what contracts, if any, said intervenors have or as to whether such contracts, if any, are verbal or written or what the provisions of said contract, if any, may be, but respondents deny that said intervenors operate solely as contract carriers. Respondents deny that intervenors have been prohibited from transporting commodities which they have heretofore been carrying under their respective contracts by reason of House Bill 335 becoming a law of the State of Texas and respondents deny that the intervenors have been [fol. 205] denied the use of the highways of the State in pursuit of their respective contracts and have been compelled to discontinue the further pursuit of their business and the carrying out of their contracts.

Respondents deny that intervenors, their servants and employees, have been ordered to discontinue and abandon all further operations as contract carriers.

III

In answer to paragraph V of said intervention, respondents say that they are not informed as to the length of time intervenor Ites has been engaged in the business of operating motor trucks, nor the exact nature of his operation or contracts, nor as to what action, if any, the Herrin Transfer & Warehouse Company took on August 22, 1931, nor as to what intervenor Ites received as compensation for his transportation services but respondents specially deny that the intervenor Ites is prohibited from transporting commodities over the highways of this State by the terms of the Act complained of or that he will be compelled to discontinue the pursuit of his business.

IV

In answer to paragraph VI of said intervention, the respondents deny that there was no occasion for intervenor Ites to have a Class B Permit prior to the effective date of House Bill 335 and that he did not fall within the cate-

gory of those motor truck operators required to have Class B Permits. Respondents say that they are not informed as to whether the said intervenor complied with other laws in force and effect at said time.

[fol. 206] Respondents deny that this intervenor was forced and compelled to immediately cease and abandon all operations on August 22, 1931.

V

In answer to paragraph VII of said intervention, respondents say that they are not informed as to whether or not the intervenor Ites made an application for a contract carrier permit to the Railroad Commission of Texas.

Respondents say that they are not informed as to how the intervenor Ites felt as to the possibility of receiving a contract carrier permit should he make an application.

Respondents specially deny that the intervenor has had to cease all operations of his trucks over the highways of the State of Texas by reason of the terms of the Act complained of.

VI

Answering paragraph VIII of said intervention, respondents say that they are not informed as to what character of contract Herrin Transfer & Warehouse Company would again enter into; but respondents deny that any provisions of House Bill 335 prohibit the intervenor from continuing his business of transporting commodities over the highways of this State.

Respondents say that they are not informed as to what insurance the intervenor Ites carries but deny that he has obtained the approval of the Railroad Commission of Texas as to the policies of insurance which he has in compliance with the terms of said Act and deny that he has obtained licenses from the Railroad Commission for the drivers of his trucks as is required by the provisions of said act and respondents deny that said intervenor has otherwise complied with many provisions of said Act and respondents deny that the said intervenor cannot submit to the rates promulgated by the Railroad Commission.

[fol. 207]

VII

Answering paragraph IX of said intervention, respondents say that they are not informed as to the matters and

things therein alleged except that respondents deny that House Bill 335 will compel intervenor to discontinue the pursuit of his business.

VIII

Answering paragraph X of said intervention, respondents say that they are not informed as to the matters and things alleged in connection with the business of intervenors, Bilbo, Carroll and Robinson, nor how they conduct their business on the public highways or what equipment they own, the number of persons they employ or the other matters and things therein alleged, except as otherwise herein alleged; but respondents deny that said intervenors could not secure a hearing within a reasonable time by the exercise of due diligence.

IX

Answering paragraph XIX of said intervention, respondents say that they are not informed as to what intervenor Ites believed concerning his chances of obtaining a permit under the provisions of House Bill 335 but respondents deny that he would have had no chance to obtain such permit and respondents affirmatively allege that the Railroad Commission of Texas, in conducting hearings, making rules and regulations and otherwise administering the provisions of House Bill 335, has in every manner conducted itself efficiently, fairly and impartially so that intervenors or any other person will be granted or denied a permit according to whether or not they complied with the provisions of said Act and the lawful rules and regulations of the Commission promulgated in pursuance thereof. [fol. 207½] Respondents specifically deny that the unquoted portions of said paragraph numbered (a), (b), (c), (d) and (e) correctly set forth the rules and regulations promulgated by the Railroad Commission and respondents say that the Act speaks for itself with regard to the requirements of an application and proof necessary to secure a permit.

Respondents say that they are not informed as to what intervenors knew or as to what burden of proof they could discharge. Respondents further say that they are not informed as to what the Railroad Commission will likely hold as to whether or not intervenors are entitled to a permit.

X

Respondents show that they have heretofore fully answered the original complaint in this cause and each of the several interventions heretofore filed, which original complaint and interventions contain allegations in many respects identical or substantially like the allegations contained in this intervention and respondents here now refer to said original answer and the answers to the several interventions and here now adopt, approve, ratify, reallege and confirm all of their answers to said original complaint and interventions, as fully as though said answers were set out herein in full, in so far as applicable to this intervention and not inconsistent with the allegations herein otherwise made.

And for affirmative pleading herein respondents show:

I

That they have made certain affirmative allegations in their answer to the original bill of complaint and in their several answers to the several interventions heretofore filed herein and respondents here now refer to said affirma-
[fol. 208] tive allegations in said answer and here now approve, ratify, reallege and confirm all of said affirmative allegations in said answers, the same as though said affirmative allegations were set out in full herein.

Wherefore, having fully answered, respondents pray that the temporary injunction prayed for be in all things denied and that upon the final hearing hereof the permanent injunction prayed for be in all things denied; that the Act complained of and each and every provision thereof be held to be constitutional; for all costs of this suit and for all other and further relief which to this Court may seem necessary, meet or proper.

James V. Allred, James V. Allred, Attorney General. T. S. Christopher, T. S. Christopher, Assistant Attorney General. Elbert Hooper, Elbert Hooper, Assistant Attorney General.

Duly sworn to by Elbert Hooper. Jurat omitted in printing.

[fol. 209] [File endorsement omitted.]

[fol. 210] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE HEARING ON PERMANENT INJUNCTION TO BE HAD ON AFFIDAVITS AND EXHIBITS—Filed March 19, 1932

It is stipulated and agreed by and between all of the parties to the above styled and numbered cause, acting herein through their respective attorneys of record and with the approval of the court first had and obtained, that this cause be tried and determined upon final hearing on the matter of permanent injunction on affidavits and exhibits.

It is agreed that each party whose affidavit is introduced, would have testified to the matters and facts therein contained had he given oral testimony in open court, and that the contents of each affidavit are to be considered in the same manner as if it were testimony adduced from the witness stand.

This agreement made and entered into this the 9th day of March, A. D. 1932.

Fulbright, Crooker & Freeman, Franklin & Blankenbecker & Jas. J. Shaw, Attorneys of Record for Complainant J. H. Stephenson and Intervenors W. S. Finnegan, P. E. Arnett, D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll, and A. S. Robinson. James V. Allred, Atty. General; T. S. Christopher, Elbert Hooper, Asst. Atty. General, Attorneys of Record for All Respondents. W. L. Cook, A. S. Reed, of Counsel.

Approved.

J. C. Hutcheson, Jr., United States Circuit Judge. Duval West, T. M. Kennerly, United States District Judges.

[File endorsement omitted.]

[fol. 211] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law—Filed June 8, 1932

FINDINGS OF FACT

Pursuant to the requirements of Equity Rule 70½, the statutory Three-Judge Court that passed upon the above cause herewith files the following findings of fact:

I

That complainant J. H. Stephenson, is engaged in the business of transporting commodities for hire by motor truck over the highways of Texas between Houston and San Antonio, under a contract between it and the Southwest Freight Company, Inc.,; That said Southwest Freight Company Inc., is a Freight forwarding agency collecting and consolidating into shipping lots, the freight shipments of all kinds and character of the general shipping public for forwarding either by motor truck or by railroad in its own name for the account of the owners of the freight; that said Southwest Freight Company Inc., holds itself out to the general public and solicits any and all freight offered by the general public for transportation.

We find the Southwest Freight Company Inc., is not directly engaged in the transportation business but that it contracts with all classes of carriers including common carriers, railroads, common carrier trucks, and contract [fol. 212] carrier trucks, for the purpose of obtaining transportation.

II

That complainant-intervenor, W. S. Finnegan, is engaged generally in the business of transporting commodities as a contract carrier for hire by motor truck over the highways of the State, but presently his transportation is confined to carriage between Houston, Texas, on the one hand and Dallas, San Benito, Brownsville and McAllen, on the other hand, under a contract between it and the West Texas Motor Freight Lines.

III

That complainant-intervenor, P. E. Arnett, is engaged in the business of transporting commodities as a contract carrier for hire by motor truck over the highways, but presently his transportation is confined to carriage between Houston, on the one hand, and Beaumont and Port Arthur, and other points throughout the State, on the other hand, under a contract between it and the Linde Air Products Company of Texas.

IV

That complainant-intervenor, D. A. Beard, is engaged in the business of transporting commodities for hire by motor truck over the highways of Texas between Houston and points generally in the State under a contract between it and the Peden Company.

V

That complainant-intervenor, B. E. Ites, is engaged generally in the business of transporting commodities, as a contract carrier, for hire by motor truck over the highways of the State, but presently his transportation is confined to carriage under a contract between it and the Herrin Transfer & Warehouse Company.

VI

That complainant-intervenors, V. C. Bilbo, J. T. Carroll and A. S. Robinson, are engaged generally in the business [fol. 213] of transporting commodities as contract carriers for hire by motor truck over the highways of Texas, but presently their transportation is confined to carriage between points within the State under contracts between them and the Great Atlantic & Pacific Tea Company.

VII

The complainant, J. H. Stephenson, and the complainant-intervenors, W. S. Finnegan, P. E. Arnett, D. A. Beard, V. C. Bilbo, B. E. Ites, J. T. Carroll and A. S. Robinson, are each engaged in the business of transporting property for hire by motor trucks over the highways of the State of Texas as contract carriers, but, though the particular work they are now doing is under private contract with one cus-

tomer, motor carriers of this character, as a business, usually and at their own option, transport selected commodities for different customers between numerous points from time to time; that, though any one operator is a private carrier, the combined results of the numerous contract carrier operations, including complainant and complainant-intervenors and others similarly situated, adding together the carriers and their contracts, constitute a transportation which, in its sum total, includes every character of carriage which is performed by common carriers.

VIII

We find that there are 16,890 miles of railway lines in Texas representing a property investment of over nine hundred million dollars. That while this system of railways has been developed in order to meet the transportation needs of the State, a large part of such facilities lie idle and unused due, in some measure at least, to the competition of motor truck transportation; that in nearly all instances railway lines are paralleled by one or more competing common carrier truck lines operating over public highways; that many other points in Texas not reached by railways are served by common carrier motor truck lines.

[fol. 214]

IX

The Legislature, in effect, found that the lack of regulation of minimum rates of contract carriers operating at will over the highways selecting particular shipments and desirable traffic to handle served to produce discrimination and preferences as between communities, shippers and commodities, with a resulting disorganization, disruption and disturbance of transportation service not in the interest of the public, and we think the evidence not only does not overcome, but, on the contrary, supports this view.

X

The Legislature, in effect, found that the regulation of the minimum rates to be charged by contract motor carriers for hire will serve to stabilize highway and railroad transportation and eliminate discriminations, preferences and rebates, and we find the evidence supports this view.

XI

The Legislature, in effect, found that motor truck transportation cannot adequately serve the people of Texas in all their transportation needs and we find that the evidence supports this view.

XII

The Legislature, in effect, found that the regulation of the minimum rates of contract motor carriers is necessary in the public interest to conserve and maintain an adequate transportation system capable to serve the entire needs of the people of the State, and we think the evidence supports this finding.

XIII

(a) That pursuant to the provisions of House Bill 335, which became effective August 22, 1931, the Railroad Commission of Texas promulgated minimum rates to be charged and received by contract carriers. (b) That said rates pre- [fol. 215] scribed as a minimum are higher than and in excess of the rates and charges fixed by the contracts between complainants and intervenors and their customers.

XIV

That complainant, J. H. Stephenson, and complainant-intervenors, W. S. Finnegan, P. E. Arnett, D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson, have been threatened with arrests and prosecutions by enforcement officers of the State for failure to comply with the provisions of the Act.

XV

We find that there are approximately 200,000 miles of state and county highways in Texas and that less than 20,000 miles of these highways are State Designated Highways; and that the improvements to the State Designated Highway System represent a public investment of more than $250,000,000.00.

XVI

The maintenance cost upon the State Highway System alone, which comprises approximately 20,000 miles of the 200,000 miles of state and county roads, has averaged $12,000,000.00 per annum during the past three years.

XVII

The number of trucks on the highways of Texas has increased more than three hundred per cent (300%) in the period from 1924 to 1930 as shown by registrations for 1924, when there were 65,536 registered in the State, while in 1930 the total registration amounted to 206,527.

XVIII

The number of Class A common carrier certificates under the former law continually decreased while the number of Class B operators continually increased as shown by the fact that in December, 1929, there were 462 Class A common carrier certificates in force and 2,190 Class B carriers in operation, whereas in August, 1931, there were 364 Class A [fol. 216] common carriers and 3,168 Class B carriers in operation. In addition, there were a great number of operators who took out no permits under the old law.

XIX

Actual counts of motor truck traffic on the highways of Texas show a tremendous increase in such traffic on all of the principal highways of Texas in 1931 over 1929.

XX

The evidence shows there are 1,360,413 motor vehicles other than either common or contract carriers or commercial carriers of passengers registered for use on the highways of Texas, and that it is one of the purposes of the Legislature to make the use of the highways safer and more convenient for these private operators, involving incidentally either a lessening of commercial transportation on the highways, or such improvement in their character and practices as to effect the same result. In this connection, the Court finds that the provisions of the statute carried out in accordance with the declaration of purpose and the specific instructions therein will have the effect either of lessening commercial traffic on the highways, or, by bringing it under careful and adequate supervision, of making the use thereof by the very large number of owners and operators of private motor vehicles safer and more convenient.

XXI

The increase of unregulated truck transportation over the highways had developed a difficult and perplexing public problem to the extent that the Governor of the State in his message to the Legislature called attention to the fact that the highways were being taken and badly used by motor vehicles engaged in the transportation of freight for hire.

XXII

The number of contract carriers on the highways of Texas having rapidly grown, as elsewhere found, the busi- [fol. 217] ness they conduct now exists as a very large factor in commercial transportation. The court finds that it is not the effect of one such carrier or a limited number thereof which produced the serious problem with which the Legislature of Texas purported to deal and has dealt, but it is the effect, in the aggregate, of such contract carriers that is important.

XXIII

In its relation to business, unregulated and unstabilized transportation such as afforded by contract carriers on the highways of Texas, in the opinion of the Legislature of Texas as declared in the Act, is detrimental since commercial transportation, as a factor in business, should be reasonably stabilized and offered by all who compete in the same field upon substantially the same terms, and the court finds that the evidence supports this view.

XXIV

The inevitable result of the continuance of the enormous increase of so-called private carriers for hire and the continual decrease in the number of common carriers holding certificates of public convenience and necessity will be the practical disappearance altogether of common carriers from the roads.

XXV

The Legislature has declared that all of the available carriage service, including common carriage by rail and road and contract carriage by road, are so interdependent

that the public may not continue to have a safe and dependable transportation system unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulations bringing their service into relation with common carriers, and we find the evidence supports this finding.

XXVI

The requirement of the Texas statute under attack that contract carriers must have a permit with the prerequisites [fol. 218] in the statute for such a permit, is reasonable, particularly in that this method enables the State to know who will use its highways and to more efficiently regulate such use. The permit system has immediate relation to the condition of the roads and bridges, congestion of the highways and the character of equipment to be used, which relates not only to the effect of the operations on business but also to the problem of safety and convenience in use of the highway.

XXVII

The experience of the Railroad Commission supports the Legislative declaration that unregulated contract carriers under the former law effectively prevents the primary purpose of fostering and conserving for the public welfare all commercial transportation on the highways which it has been the purpose of the laws of Texas, under rules of the Commission, to foster.

XXVIII

The granting to the Commission of the power to grant or refuse a permit to a contract carrier upon a determination of whether the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory will be impaired, the power to fix minimum rates to be charged by contract carriers, which rates shall not be less than those charged for common carriers for substantially the same service, the forbidding of rebates and discrimination by contract carriers, and the requiring that contract carriers keep books of account and make reports to the Commission are reasonable regulations reasonably designed to effect

the State's declaration of purpose and policy that the use of the highways by motor carriers for hire is a business affected with the public interest.

[fol. 219] XXIX

The Legislature has declared that the business of operating as a motor carrier of property for hire along the highways of Texas is a business affected with the public interest, and we think the evidence not only does not overcome but, on the contrary, supports this declaration.

XXX

We find that the Legislature has not undertaken to convert private carriers into common carriers, nor upon the pretext of regulating highways to impose arbitrary restrictions upon the business of those who use them. What it has done has been to put into effect the Legislative policy, which it has declared should be adopted, that the business of carrying for hire on the public roads is a business affected with the public interest which may be enjoyed only under Legislative grant.

XXXI

That it has fixed the condition of such grant in clear and plain language and that any person desiring to operate a business on the roads may obtain a franchise according to his desires.

XXXII

We find that the Legislature has found that this system of regulation is designed in the interest of public convenience, and that it will operate to bring highway order out of highway chaos by preventing a further disintegration of the all but practically destroyed common carrier service on the roads, and that the exercise of the powers which the Act confers will not only protect the highways and the people on them from the result of reckless and careless operation, but will give the whole people of the State a safe and dependable system of transportation for the carrying of their freight by highways. The Legislature having so found, we find nothing in the evidence to overthrow this finding or to make it appear unreasonable.

[fol. 220] CONCLUSIONS OF LAW

I

It is our opinion that the State has the power to, and it has declared that the business of operating for hire on the public roads of Texas is a business affected with the public interest, and that it may not be conducted except under Legislative grant.

II

That it has the power to affix and it has affixed to the franchises which must be obtained in order to conduct the business — reasonable conditions.

III

That the Legislature has not undertaken to convert private carriers into common carriers by any kind of fiat, and it has not imposed arbitrary restrictions upon the business of persons using the highways.

IV

That it merely has done what it has a right to do, asserted its will as to the conditions under which persons who use the public roads in the conduct of their business may obtain a franchise to use them, and that the exercise of such powers has not, in any manner, transgressed the Fourteenth Amendment.

V

That the Legislature has, by a comprehensive Legislative program, consisting of the Act in question here and other Acts not now under review, undertaken to remedy the mischiefs incident to the unregulated use of the highways, and that the challenged Act represents the reason-
[fol. 221] able exertion of the States' power over its highways and over those who use them to conduct their business thereon.

J. C. Hutcheson, Jr., United States Circuit Judge for the Fifth Circuit. Duval West, United States District Judge for the Western District of Texas (by J. C. H., Jr.). T. M. Kennerly, United States District Judge for the Southern District of Texas (J. C. H., Jr.).

[File endorsed omitted.]

[fol. 222] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

In Equity. No. 479

J. H. STEPHENSON, Complainant; W. S. FINNEGAN, P. E. Arnett, D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll, and A. D. Robinson, Complainant-Intervenors,

vs.

T. BINFORD et al., Respondents

DECREE DENYING PERMANENT INJUNCTION—Filed June 8, 1932

This cause came on for hearing on the matter of permanent injunction before the statutory Three-Judge Court convened by the Honorable T. M. Kennerly, United States District Judge, for the Southern District of Texas, by calling to his assistance the Honorable J. C. Hutcheson Jr., Judge of the United States Circuit Court for the Fifth Circuit, and the Honorable Duval West, Judge of the District Court of the United States for the Western District of Texas, pursuant to Section 380 of Title 28 U. S. C. A. on application of J. H. Stephenson, cpmplainant in the above styled cause, and W. S. Finnegan, P. E. Arnett, D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson, complainant-intervenors, on the bill of complaint and interventions filed in this cause and praying for a permanent injunction enjoining and restraining defendants from enforcing against complainant and complainant-intervenors the provisions of House Bill No. 335, passed by the Forty-Second Legislature of the State of Texas, at its Regular Session, in the year 1931; and the court having considered the pleadings of all of the parties in said cause and the evidence introduced by the respective parties hereto, and having heard the arguments of counsel and having considered the briefs filed by the respective parties to this cause, the court, one member dissenting, is of the opinion that the permanent injunction prayed for by complainant and com-
[fol. 223] plainant-intervenors should in all things be denied.

It is therefore ordered, adjudged and decreed by the Court that the application of complainant and complain-

ant-intervenors for permanent injunction herein be and the same is hereby denied.

Dated June 8th A. D. 1932.

J. C. Hutcheson, Jr., Judge United States Circuit Court for the Fifth Circuit. Duval West, Judge United States District Court for the Western District of Texas (J. C. H., Jr.). T. M. Kennerly. Judge United States District Court for the Southern District of Texas (J. C. H., Jr.).

[File endorsement omitted.]

[fol. 224] In United States District Court

[Title omitted]

Notice of Appeal to United States Supreme Court—Filed July 7, 1932

To T. Binford, O'Brien Stevens, R. J. Martin, Albert Hausser, D. R. Davis, Cone Johnson, W. R Ely, E. K. Martin, L. G. Phares, R. S. Sterling, James V. Allred, C. V. Terrell, Lon A. Smith, and Pat M. Neff:

You, and each of you, are hereby notified that the complainant, J. H. Stephenson, and complainant-intervenors, W. F. Finnegan, P. E. Arnett, D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson, do hereby, on this the sixth day of July, A. D. 1932, appeal from the decree of the Court, signed, filed and entered in the above cause on the 8th day of June, A. D. 1932, being that certain cause entitled "In Equity No. 479", wherein J. H. Stephenson is complainant and W. S. Finnegan, P. E. Arnett, D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson are complainant-intervenors, and wherein the respondents are the parties to whom this notice is addressed—said appeal being to the Supreme Court of the United States.

J. H. Stephenson, Complainant; W. S. Finnegan, P. E. Arnett, D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll, and A. S. Robinson, by Fulbright, Crooker & Freeman, Franklin & Blankenbecker & Jas. J. Shaw, Their Attorneys of Record.

[fol. 225] Copy of notice of appeal received and service acknowledged this 6th day of July, A. D. 1932.

T. Binford, O'Brien Stevens, R. J. Martin, Albert Hausser, D. R. Davis, Cone Johnson, W. R. Ely, E. K. Martin, L. G. Phares, R. S. Sterling, James V. Allred, C. V. Terrell, Lon A. Smith and Pat M. Neff, by James V. Allred, Atty General; Elbert Hooper, T. S. Christopher, Asst. Attys. General, Attorneys of Record for Respondents.

[File endorsement omitted.]

[fol. 226] In United States District Court

[Title omitted]

Petition for Appeal—Filed July 6, 1932

To the Honorable Joseph C. Hutcheson, Jr., United States Circuit Judge; Honorable T. M. Kennerly, and Honorable Duvall West, United States District Judges:

Your petitioners J. H. Stephenson, W. S. Finnegan, P. E. Arnett, D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll, and A. S. Robinson, complainant and complainant-intervenors in the above entitled and numbered cause, pray that they may be permitted to take an appeal from the decree of the Court denying them a permanent injunction entered in the above cause on the 8th day of June, A. D. 1932, to the Supreme Court of the United States, for the reasons specified in the assignments of error which are filed herewith.

Wherefore petitioners pray that an appeal be allowed to the Supreme Court of the United States for the correction of the errors complained of, and that citation may be issued as provided by law, and that a transcript of the record, proceedings and papers in this case, upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States, in accordance with the rules in such cases made and provided.

Petitioners further pray that a proper order be made relating to the appeal bond to be given by petitioners.

[fol. 227] Dated this 6th day of July, A. D. 1932.

Fulbright, Crooker & Freeman, Attorneys for Complainant J. H. Stephenson and Complainant-intervenors W. S. Finnegan and P. E. Arnett. Fulbright, Crooker & Freeman, Franklin & Blankenbecker, Attorneys of Record for Complainant-intervenors B. E. Ites, V. C. Bilbo, J. T. Carroll, and A. S. Robinson. Franklin & Blankenbecker, James J. Shaw, Attorneys of Record for Complainant-intervenor D. E. Beard.

[File endorsement omitted.]

[fol. 228] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR URGED BY COMPLAINANT AND COMPLAINANT-INTERVENORS—Filed July 6, 1932

In and to said Honorable Court:

Come now J. H. Stephenson, complainant in the above numbered and entitled cause, and W. S. Finnegan, P. E. Arnett, D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson, complainant-intervenors in said cause, and, as their grounds and reasons for appealing from the decree of the Court entered on June 8, A. D. 1932, respectfully specify the following assignments of error:

I

The Court erred in holding that the requirements of House Bill No. 335, passed by the 1931 Legislature of Texas, are valid and constitutional, and that if complainant and complainant-intervenors desired to conduct their business of transporting commodities as private contract carriers on the highways of the State of Texas, they must comply with all of the provisions of said Act.

II

The Court erred in holding that the Legislature of Texas had the right to deny to complainant and complainant-intervenors the right to operate their vehicles over the high-[fol. 229] ways of the State of Texas as private contract carriers, if the Railroad Commission of Texas should be of the opinion that such operations of complainant and complainant-intervenors "will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory," as is provided in subdivision (c), Section 6 of House Bill 335, passed by the 1931 Legislature of Texas

III

The Court erred in holding that the State of Texas had the right to deny unto complainant and complainant-intervenors the use of its highways for the purpose of operating upon same as private contract carriers, if complainant and complainant-intervenors did not comply with the orders of the Railroad Commission of Texas, fixing, prescribing or approving the maximum or minimum, or maximum and minimum, rates, fares and charges for the transportation services rendered by them, as is provided for in subdivision (a) of section 4 of said House Bill No. 335, passed by the 1931 Legislature of Texas.

IV

The Court erred in holding that complainant and complainant-intervenors, although private contract carriers, could be compelled by the State of Texas, through its Railroad Commission, to submit to the rates, fares and charges adopted and promulgated by said Commission, and that as an incident to the right of operation as contract carriers, complainant and complainant-intervenors must charge and receive rates in an amount equal to the minimum rates, fares and charges prescribed for common carriers rendering substantially the same service, and no less.

V

The Court erred in holding that the State of Texas had the right and power to control and regulate the rates to be

charged by complainant and complainant-intervenors, al-
[fol. 230] though they be private contract carriers, and that upon complainant's and complainant-intervenors' failure to charge the rates prescribed by the Railroad Commission, the State of Texas had the right to deny them the use of its highways,—all as is provided in House Bill No. 335, passed by the 1931 Legislature of Texas.

VI

The Court erred in holding that the State of Texas, through its Railroad Commission, could so control and regulate the charges made and moneys received by complainant and complainant-intervenors for transportation services rendered as purely private contract carriers, that if complainant or complainant-intervenors, directly or indirectly, or by any special rate, rebate, drawback, or other device, should charge, demand or contract for, collect or receive, a less compensation for any services rendered, or to be rendered, than is prescribed for said services by the Railroad Commission of Texas, they would be guilty of a misdemeanor and upon conviction would be subject to a fine not to exceed Two Hundred Dollars for each offense, as is provided in subdivision (i) of section 17 of said House Bill 335, passed by the 1931 Legislature of Texas.

VII

The Court erred in holding that complainant and complainant-intervenors, although private contract carriers, could be compelled to carry insurance covering loss of or damage to cargo, as a prerequisite to receiving permission to operate their vehicles as such contract carriers over the highways of the State of Texas, as is prescribed in section 13 of said House Bill 335.

VIII

The Court erred in holding that subdivision (d) of section 6 of said House Bill 335, giving the Railroad Commis-
[fol. 231] sion of Texas authority to issue upon application to those persons who desired to engage in the business of transporting for hire over the highways of the State of Texas, livestock, mohair, wool, milk, feedstuffs, household goods, oil-field equipment, timber when in its natural state,

farm machinery and grain, special permits upon such terms, conditions and restrictions as the Railroad Commission may deem proper, and to make rules and regulations governing such operations—keeping in mind the protection of the highways and the safety of the traveling public—was not discriminatory against and did not deny to complainant and complainant-intervenors the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

IX

The Court erred in refusing to hold subsection (d) of section 4 of said House Bill 335, passed by the 1931 Legislature of Texas, discriminatory against complainant and complainant-intervenors, and as denying to them the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that the operators of complainant's and complainant-intervenors' trucks are required to obtain drivers' licenses, whereas, persons, firms and corporations owning their own trucks and transporting their own commodities are not required to obtain licences for the drivers operating their trucks over the highways of the State of Texas.

X

The Court erred in refusing to hold section 6-cc of said House Bill 335, passed by the 1931 Legislature of Texas, discriminatory against complainant and complainant-intervenors, and as denying to them the equal protection of the laws as guaranteed by the Fourteenth Amendment to the [fol. 232] Constitution of the United States, in that by said provisions complainant and complainant-intervenors are prohibited from permitting the operators of their trucks to drive said trucks for a period longer than prescribed therein, whereas, the many persons, firms and corporations owning their own*ing* trucks and transporting their own commodities are not required to abide by such regulation—their being no reasonable basis for such a classification and discrimination.

XI

The Court erred in refusing to hold that section 13 of said House Bill 335, passed by the 1931 Legislature of

Texas, was discriminatory against and denied to complainant and complainant-intervenors the equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, in that said section compels complainant and complainant-intervenors to obtain certain policies of insurance before they can lawfully operate upon the highways of the State of Texas, and which said policies of insurance are not required for persons, firms and corporations owning and operating motor vehicles over the highways of the State of Texas, and transporting their own commodities, thus bringing about an arbitrary designation and pointing out of complainant and complainant-intervenors.

XII

The Court erred in holding that section 14 of said House Bill 335, passed by the 1931 Legislature of Texas, was not discriminatory against and did not deny to complainant and complainant-intervenors the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that said section vests the Railroad Commission of Texas with power and authority, and makes it its duty, to approve or disapprove the nature and character of the equipment to be used under any permit or certificate, and the amount and character of ton-
[fol. 233] nage which may be hauled thereunder on any motor vehicle, trailer or semi-trailer used by complainant and complainant-intervenors, and to fix the number and size of boxes, packages, barrels or bales of any particular commodity transported by them—and which said regulations are not applied to or imposed upon persons, firms, or corporations operating trucks over the highways of the State of Texas in the carriage of commodities belonging to them.

XIII

The Court erred in holding that the State of Texas had the right to deny complainant and complainant-intervenors the use of the highways unless they obtained a permit, which is, under the provisions of House Bill 335, in effect a certificate of public convenience and necessity, unles complainant and complainant-intervenors submitted themselves to regulations and conditions which are unconstitutional, denying to

complainant and complainant-intervenors the equal protection of the laws and depriving them of their property without due process of law, all in violation of the Fourteenth Amendment to the Constitution of the United States; and although the Court be correct in saying that the right of complainant and complainant-intervenors to the use of the highways is a mere privilege (which is not admitted), the grant of the State of Texas to use them cannot be predicated and based upon unconstitutional conditions and regulations.

XIV

The Court erred in refusing to hold the provisions of said House Bill No. 335, passed by the 1931 Legislature of Texas, as applied to complainant and complainant-intervenors, an unwarranted and unjust interference with their private right of contract, and, accordingly, resulting in a deprivation of their property without due process of law.

[fol. 234]

XV

The Court erred in holding that as a matter of law, House Bill No. 335, passed by the 1931 Legislature and which became a law of the State of Texas on August 22, 1931, as construed and applied to complainant and complainant-intervenors, was a lawful and constitutional statute.

XVI

The Court erred in finding as a fact that: "The Legislature, in effect, found that the regulation of the minimum rates of contract motor carriers is necessary in the public interest to conserve and maintain an adequate transportation system capable to serve the entire needs of the people of the State, and we think the evidence supports this finding," (Finding of Fact No. XII) for the reason that the same is an unwarranted conclusion on the part of the Court, —wholly unsupported by any evidence.

XVII

The Court erred in finding as a fact that: "The Legislature has declared that all of the available carriage service, including common carriage by rail and road and contract carriage by road, are so inter-dependent that the public may

not continue to have a safe and dependable transportation system unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulation bringing their service into relation with common carriers, and we find the evidence supports this finding," (Finding of Fact No. XXV), for the reason that this finding is an unwarranted conclusion by the Court,—there being no evidence in the record to support it.

XVIII

The Court erred in holding that: "The granting to the Commission of the power to grant or refuse a permit to a contract carrier upon a determination of whether the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory [fol. 235] will be impaired, the power to fix minimum rates to be charged by contract carriers, which rates shall not be less than those charged common carriers for substantially the same service, the forbidding of rebate, and discrimination by contract carriers, and the requiring that contract carriers keep books of account and make reports to the Commission, are reasonable regulations reasonably designed to effect the State's declaration of purpose and policy that the use of the highways by motor carriers for hire is a business affected with the public interest" (Finding of Fact XXVIII), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling said complainant and complainant-intervenors to dedicate their property to a quasi public use, and is in effect converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deproves complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XIX

The Court erred in holding that: "The Legislature has declared that the business of operating as a motor carrier of property for hire along the highways of Texas is a business affected with the public interest, and we think the evidence not only does not overcome but, on the contrary, sup-

ports this declaration" (Finding of Fact No. XXIX), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use, and is in effect converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

[fol. 236] XX

The Court erred in finding that: "We find that the Legislature has found that this system of regulation is designed in the interest of public convenience and that it will operate to bring highway order out of highway chaos by preventing a further disintegration of the all but practically destroyed common carrier service on the road, and that the exercise of the powers which the Act confers will not only protect the highways and the people on them from the results of reckless and careless operations, but will give the whole people of the State a safe and dependable system of transportation for the carrying of their freight by highways. The Legislature having so found, we find nothing in the evidence to overthrow the finding or to make it appear unreasonable" (Finding of Fact No. XXXII), for the reason that this finding is an unwarranted conclusion by the Court.

XXI

The Court erred in holding that: "It is our opinion that the State has the power to, and it has declared that the business of operating for hire on the public roads of Texas is a business affected with the public interest, and that it may not be conducted except under legislative grant" (Conclusions of Law, I), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-inter-

venors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXII

The Court erred in holding that: "That it has the power to affix and it has affixed to the franchises which must be [fol. 237] obtained in order to conduct the business, reasonable conditions" (Conclusions of Law, II), for the reason that such a holding as applies to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXIII

The Court erred in holding that: "That the Legislature has not undertaken to convert private carriers into common carriers by any kind of fiat, and it has not imposed arbitrary restrictions upon the business of persons using the highways" (Conclusions of Law, III), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXIV

The Court erred in holding that: "That it merely has done what it has a right to do, asserted its will as to the conditions under which persons who use the public roads in the conduct of their business may obtain a franchise to use them, and that the exercise of such powers has not, in any manner, transgressed the Fourteenth Amendment"

(Conclusions of Law, IV), for the reason that such a holding as applied to the status of complainant, and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use and is, in [fol. 238] effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXV

The Court erred in holding that: "That the Legislature has, by a comprehensive legislative program, consisting of the Acts in question here and other Acts not now under review, undertaken to remedy the mischiefs incidental to the unregulated use of the highways, and that the challenged Act represents the reasonable exertion of the State's power over its highways and over those who use them to conduct their business thereon" (Conclusions of Law, V), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

In addition to the above assignments of error, complainant-intervenor D. A. Beard also specifies the following assignments of error:

XXVI

The Court erred in holding that the rate features of the Act constituted highway regulation in any permissible sense of protecting the highways or the public upon the highways. Indeed the rate feature of the Act whereby a private contract carrier, such as intervenor for the Peden Company, must charge the common carrier rate is in no sense highway regulation for the protection of either the [fol. 239] highways or the public upon them and has no

relation to that end, but is purely arbitrary provision under the guise of highway regulation in order to interfere with the rights of private contract in the interest of common carriers.

XXVII

The Court erred in holding that intervenor Beard holds himself out to the public for all the carriage upon the highways he may get to do and in suggesting that there is "more than a little question" as to whether he is not a common carrier. Such a holding is wholly gratuitous and without basis of fact and without a scintilla of evidence to support it. On the direct contrary, the intervenor is seeking to protect by his intervention herein only his private contract with Peden Company under which he seeks alone to protect merely his right to do a portion of the private hauling of Peden Company between its warehouses and to make deliveries to a portion of its retail customers from time to time. Therefore, the statement of the Court in its opinion is in serious error and highly prejudicial and the suggestion that he seeks herein under the form of a contract carrier to become a common carrier is without the slightest basis.

XXVIII

Since there is nothing in the Act under attack to prevent the Peden Company from transporting over the public highways of the State by motor vehicle its own commodities between its warehouses and to its customers, the Peden Company and intervenor constitutionally have the right to contract for intervenor to perform the service which Peden Company may under the Act legally perform. The court, therefore, erred in holding that such contract between them may not be performed without a permit from the Railroad Commission and only upon a finding by it that the performance of the same would not impair the efficient public service of any common carrier then adequately serving the same territory and, moreover, that such transportation may not be performed unless the common carrier tariff is charged and paid.

[fol. 240]

XXIX

The Court erred in holding that the Act does not apply to the use of roads for hire by individuals who are not in

the general business of carriage for hire but who as mere agents for another make a charge for hauling upon the highways, in the very face of the contrary language of the Act itself which specifically makes all its provisions directly applicable to every person "operating any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State," except within incorporated cities or towns. The construction, therefore, which the court gives to the Act to sustain its constitutionality is in the very teeth of the Act itself.

Wherefore complainant and complainant-intervenors pray that the decree of the court denying them the permanent injunction prayed for be in all things reversed, and that the permanent injunction prayed for by them be granted.

Fulbright, Crooker & Freeman, Attorneys for Complainant J. H. Stephenson and Complainant-Intervenors W. S. Finnegan and P. E. Arnett. Fulbright, Crooker & Freeman, Franklin & Blankenbecker, Attorneys for Complainant-Intervenors B. E. Ites, V. C. Bilbo, J. T. Carroll, and A. S. Robinson. Franklin & Blankenbecker, James J. Shaw, Attorneys for Complainant-Intervenor D. A. Beard.

[File endorsement omitted.]

[fol. 241] In United States District Court for the Southern District of Texas, Houston Division

Equity. No. 479

J. H. Stephenson et al., Complainants,

vs.

T. Binford et al., Respondents

Order Allowing Appeal to Supreme Court of the United States—Filed July 6, 1932

On this the 6th day of July, A. D., 1932, came the petitioners, J. H. Stephenson, W. S. Finnegan, P. E. Arnett,

D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll, and A. S. Robinson, through their attorneys of record, Fulbright, Crooker & Freeman, and Franklin & Blankenbecker and James J. Shaw, and filed and presented their petition for appeal and their assignments of errors, and the Court having given the same due consideration, it is now ordered and adjudged:

That said petition for appeal and assignments of errors be considered and duly filed; that an appeal to the Supreme Court of the United States from the decree heretofore entered in the above entitled cause denying petitioners a permanent injunction be and the same is hereby allowed to said petitioners; and a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be transmitted in due course and in the manner provided by law to said Supreme Court of the United States;

It is further ordered that said petitioners file an appeal bond in this cause in the sum of Five Hundred ($500.00) Dollars, payable and conditioned as provided by law.

J. C. Hutcheson, Jr., United States Circuit Judge. Duval West, J. C. H., Jr., United States District Judge. T. M. Kennerly, J. C. H., Jr., United States District Judge

[fol. 242] [File endorsement omitted.]

[fols. 243-245] Bond on appeal for $500.00, approved and filed July 6, 1932, omitted in printing.

[fol. 246] In United States District Court for the Southern District of Texas, Houston Division

In Equity. No. 479

J. H. Stephenson, Complainant,

vs.

T. Binford et al., Respondents

Statement of Evidence—Filed August 16, 1932

Evidence Presented to the Court in the Form of Affidavits and Exhibits

Affidavits and Exhibits Introduced by Complainant and Complainant-intervenors

Affidavit of T. R. Rogers

That he is the general manager of the Southwest Freight Company, Inc., with general offices and headquarters in Houston, Texas. That he is acquainted with J. H. Stephenson and familiar with the contract entered into between Southwest Freight Company, Inc., and J. H. Stephenson. That he has read the bill of complaint filed by J. H. Stephenson in the United States District Court styled "J. H. Stephenson vs. T. Binford et al." and complaining of House Bill No. 335, passed by the Legislature of Texas in 1931 and which became a law on August 22, 1931.

That the contract therein set out by the said J. H. Stephenson and being in the nature of a letter written on March 2, 1931 and appearing on page four of said bill of complaint, is a true copy of the agreement and contract entered into by Southwest Freight Company, Inc., with said J. H. Stephenson, and that he approved said contract for Southwest Freight Company, Inc.

That since the date said contract was entered into, said J. H. Stephenson has fully and completely discharged his duties and obligations thereunder, and has rendered the quality of services he was obligated to give under its terms.

That said carriage for the Southwest Freight Company, [fol. 247] Inc., must be transported immediately and in strict compliance with said contract, for the reason that

immediate delivery thereof is imperative, and any delay in service on the part of the carrier would necessitate a cancellation of the contract held with said Southwest Freight Company, Inc. That the failure on the part of J. H. Stephenson to render service promptly will compel the Southwest Freight Company, Inc., to cancel said contract and make other arrangements for said transportation.

AFFIDAVIT OF CHAS. H. TIPS

That he is a resident of Houston, Harris County, Texas, and is engaged in the business of selling trucks under the trade name of Brockway Indiana Truck Sales Company. That by reason of said business he is constantly upon the highways of the State of Texas and more particularly upon the highways in South Texas, and is conversant with the character of trucks that are operated upon the highways, together with their ownership and other facts pertaining to the operation of trucks by companies wherein commodities belonging to them are transported in their own trucks operated by their employes. That he knows that various oil companies, including the Humble Oil Company, Gulf Company, The Texas Company, Fuel Oil Company and Houston Oil Company own fleets of trucks in the aggregate number of over five hundred, which they operate over the highways of the State of Texas in transporting commodities belonging to them and which said trucks are operated by their own employes. That said trucks are of various types and capacities, the average truck being of two and one-half ton capacity and some being as large as five ton capacity.

That said trucks are daily and continuously being operated by said companies over the highways of the State of Texas in the transportation of products belonging to them, and that they form a material portion of the *highway* traversing the highways in certain portions of the State.

That he knows of a considerable number of trucks being operated by companies selling building materials and other companies selling dairy products, and still others engaged in the ice-cream business, wherein their respective said products are being transported over the highways of the State of Texas, and which said trucks are operated by said

[fol. 248] employes of said companies. That this transportation forms a material portion of the traffic on the highways of certain parts of the State.

Affidavit of D. A. Beard

I am one of the intervenors in this cause. On or about April 15, 1931 I entered into an oral agreement with the Peden Company, wholesale jobber and distributor of miscellaneous hardware, mill and industrial supplies, and iron and steel supplies, with principal headquarters at Houston, Texas, for the transportation of its commodities to its warehouses at San Antonio, Beaumont, Abilene, and other places in Texas; also from their Houston warehouse to customers in the State of Texas.

I agreed with Peden Company to transport its commodities by motor vehicle to different points in the State of Texas as directed by it from time to time and at rates of carriage mutually satisfactory and agreed upon between us. Since entering into this agreement with Peden Company, both parties have been entirely satisfied and the rates of carriage have been and are now satisfactory to both of us. I do not handle all of the transportation for Peden Company, but my idea is that I carry about one-third of the articles they move. The rest of their transportation is handled by rail. Since about the 15th of April, 1931, I have been paid by Peden Company about Fifteen Thousand Dollars for these services. Peden Company wishes to continue its arrangement with me and will continue the same in the future provided our mutually satisfactory arrangement is not interfered with by the Act of the Legislature of which I complain.

The rates of transportation paid to me have been substantially lower than the common carrier and railroad carriage for like quantities between corresponding points. By "common carrier rates" I mean the rates prescribed by the Railroad Commission of Texas; common carrier railroads, and motor carrier common carriers are compelled to charge a fixed rate.

Attached hereto and marked "Exhibit A" is a tabulation showing illustrative rates for transportation services which

I have performed for the Peden Company. This exhibit shows also the common-carrier rate applicable to each of such shipments, and the rate charged for similar shipments by me between the same points. The illustrations are fairly representative of the services and relative charges and rates made by me under my relation with the Peden [fol. 249] Company.

I do not make any regular trips for them, or have any regular schedule. I haul as and when they direct and where they direct. It would not be unusual out of a hundred trips made for the company for me not to make the same place half a dozen times. A great deal of my hauling for them is made under special arrangement for compensation agreed upon between us, taking into consideration what is hauled and the facilities with which the point is reached. This compensation is sometimes not agreed upon until just before the trips are made, and sometimes not until after they are made. We do not have any fixed charges; my compensation is subject to adjustment from time to time and from place to place, taking into consideration whatever is reasonable and either before or after the service is performed we reach a mutually satisfactory agreement as to what would be the proper compensation.

"Exhibit A" is illustrative of the charges which have been made on shipments to different places in comparison with the common-carrier rates. A similar shipment moving now or in the future might carry a different rate by agreement between us.

It is one of the most important features of my arrangement with the Peden Company that very frequently when they make a sale in the interior prompt delivery is demanded, and if prompt delivery cannot be made, the sale is not made.

Unless I haul Peden Company's commodities promptly from day to day, and as and when called upon, then they have the right to dispense with my services, and that is the condition upon which they are giving me their business. If the service is interrupted in any substantial way, I would expect them to discontinue the use of my trucks and they have informed me that they would do so.

I have an investment in motor trucks amounting to about Eighteen Thousand Dollars. If I cannot continue to haul

Peden Company's commodities under my existing arrangement, the principal part of this investment will be lost to me. As second-hand material, my trucks would have very little sale value.

Peden Company has never requested me to carry cargo [fol. 250] or merchandise insurance, and our agreement does not make any provision for such insurance.

I have never at any time held myself out to the public as a common carrier of freight. I do not solicit the carriage of freight from the public. At no time have I held myself out to the public as being ready willing and able to transport the goods of anyone who wished to employ my services.

(Exhibit A is attached to page 6 hereof.)

[fol. 251]

EXHIBIT "A" TO AFFIDAVIT OF D. A. BEARD

Statement Showing Characteristic Shipments Hauled by D. A. Beard, under Contract with Peden Co., and the Charges Collected Therefor from Peden Co. as Compared with Charges Prescribed by the Railroad Commission of Texas for Application via Common Motor Carriers for the Same Shipments.

From Houston, Texas				Common Carrier Motor Carrier Rates and Charges			Charges collected by D. A. Beard	
Date	Destination	Description of Shipment	Weight	Rate		Freight	Rate	Charges
6- 8-31	D Hanis, Tex.	Bbls., barn door track	160	99		$1.58		
		Cart, barn door hangers	144	99		1.43		
		Boxes, bolts	1,352	78		10.55		
		Keg, washers	108	78		.84		
		Keg, nails	56	78		.44		
		Cart, nails	108	78		.84		
		Cart, hardware	60	120		.72		
		Bdls., galv. steel sheets	8,580	78	.82	.52		
		Kegs, nails	1,498	78	.11	.68		
		Bdl., ridge roll, nested	143	99	1	.42		
		Total	14,209	...	$112.02	....	Flat	$55.00
6- 8-31	Navasota, Tex.	Keg, nails	107	39		.42		
		Bdls., galv. steel sheets	11,124	39	.43	.39		
		Bdl., ridge roll, nested	54	49		.26		
		Pkg., nails	25	39		.10		
		Total	11,310	....	$44.17	.....	19½	$22.05
6-11-31	Breckenridge, Tex.	Bdls., plain wire, black	600	81				
		Bdls., galv. steel sheets	8,421	81				
		Kegs, nails	1,070	81				
		Total	10,091	81	$81.74	.....	Flat	$47.00
6-18-31	Benjamin, Tex.	Reels, barb wire	17,374	92	$159.84	.....	Flat	$70.00

From Houston, Texas				Common Carrier Motor Carrier Rates and Charges			Charges collected by D. A. Beard	
Date	Destination	Description of Shipment	Weight	Rate		Freight	Rate	Charges
6-18-31	Los Angeles, Tex.	Bdls., galv. ridge roll, nested	215	102	.....	2.19	.....	.....
		Bdls., galv. steel sheets	6,481	80	.....	51.85	.....	.....
		Roll, steel valley	84	102	.....	.86	.....	.....
		Kegs, nails	963	80	.....	7.71	.....	.....
		Rolls, wov. wire fence	525	102	.....	5.36	.....	.....
		Bdls., binder twine	3,000	102	.....	30.60	.....	.....
[fol. 252]		Total	11,268	....	$98.47	.....	40	$45.07
7-14-31	Beaumont, Tex.	Cases, bolts	8,344	30½	....	$25.45	.....	.....
		Bdls., galv. steel sheets	2,552	30½	....	7.78	.....	.....
		Total	10,896	....	....	$33.23	Flat	$15.00
7-14-31	Beaumont, Tex.	Bdls., galv. steel sheets	12,179	30½	....	$37.15	17	$20.70
7-23-31	Brenham, Tex.	Kegs, nails	2,600	39	....	10.14	.....	.....
		Bdls., galv. steel sheets	6,679	39	....	26.05	.....	.....
		Rolls, wov. wire fence	396	49	....	1.94	.....	.....
		Rolls, wov. wire fence	420	49	....	2.06	.....	.....
		Total	10,095	....	....	$40.19	19½	$19.69
7-25-31	Dickinson, Tex.	Bdls., galv. steel pipe	519	23	....	1.19	.....	.....
		Rolls, wov. wire fence	96	24½	....	.24	.....	.....
		Sack, binder twine	25	24½	....	.07	.....	.....
		Box, hardware	155	27½	....	.43	.....	.....
		Bdls., galv. steel sheets	3,087	....	....	.....	.....	.....
		Roll, galv. steel roofing	75	23	....	20.58	.....	.....
		Kegs, nails	4,708					
		Reels, barb wire, galv.	1,076					
		Rolls, wov. wire fence	255	24½	....	.62	.....	.....
		Total	9,990	....	....	$23.13	Flat	$15.00

7-27-31	Catarina, Tex.	Rolls, wov. wire fence	1,400	111	....	$15.54	.....	.....
		Rolls, wov. wire fence	5,006	111	....	55.57	.....	.....
		Bdls., hay bale ties	300	87	....	2.61	.....	.....
		Bdl., galv. steel sheets	145	87	....	1.26	.....	.....
		Reels, galv. barb wire	2,912	87	....	25.33	.....	.....
		Kegs, nails and staples	535	87	....	4.65	.....	.....
		Total	10,298	....	....	$104.96	Flat	$45.00
8- 3-31	Lufkin, Tex.	Bdls., galv. steel sheets	6,870	47	....	.....	.....	.....
		Kegs, nails	3,950	47	....	.....	.....	.....
		Bdls., plain wire	200	47	....	.....	.....	.....
		Reels, barb wire, galv.	560	47	....	.....	.....	.....
		Total	11,580	47	....	54.43	22	$25.50
[fol. 253]								
8- 3-31	Beaumont, Tex.	Kegs, nails	10,700	30½	....	$32.64	12	$12.84
8-13-31	San Antonio, Tex.	Bdls., galv. steel sheets	8,941	61	....	54.54	25	22.35
8-13-31	Kilgore, Tex.	Pcs., steel pipe	11,000	63	....	69.30	25	27.50
8-14-31	San Antonio, Tex.	Rolls, wov. wire fence	10,602	78	....	82.70	25	26.51

Authority for common carrier motor carrier rates:
Railroad Commission of Texas, Motor Freight Class and Commodity Tariff No. 1.

[fol. 254] The above and foregoing affidavit executed by D. A. Beard was also signed and sworn to by John W. Daniel, Traffic Manager of Peden Company.

AFFIDAVIT OF C. F. PETET, SECRETARY TO THE RAILROAD COMMISSION OF TEXAS

That by virtue of his said office of Secretary to the Railroad Commission of Texas he is fully acquainted with the rates, schedules etc., promulgated by the Railroad Commission of Texas and in force at this time. That beginning with August 22, A. D. 1931, the effective date of House Bill No. 335, passed by the Legislature of Texas in 1931, the Railroad Commission of Texas established the following rates controlling the transportation of commodities by contract carriers between the hereinafter designated points, which rates represent the minimum rates that can be charged for such transportation services.

From Houston, Harris County, Texas, to San Antonio, Bexar County, Texas

For first-class commodities, being class No. 100, $1.11 per hundred pounds;

For second-class commodities, being class No. 85, $.94 per hundred pounds;

For third-class commodities, being class No. 70, $.78 per hundred pounds;

For special commodities, being classes Nos. 65 and 60, $.72 and $.67 per hundred pounds, respectively; and

For fourth-class commodities, being class No. 55, $.61 per hundred pounds.

From Houston, Harris County, Texas, to Dallas, Dallas County, Texas

For first-class commodities, $1.23;

For second-class commodities, $1.05; and

For third-class commodities, $.86.

From Houston, Harris County, Texas, to San Benito, Cameron County, Texas

For first-class commodities, $1.62;
For second-class commodities, $1.38; and
For third-class commodities, $1.13.

[fol. 255] From Houston, Harris County, Texas, to Brownsville, Cameron County, Texas

For first-class commodities, $1.67;
For second-class commodities, $1.42; and
For third-class commodities, $1.17.

From Houston, Harris County, Texas, to McAllen, Hidalgo County, Texas

For first-class commodities, $1.66;
For second-class commodities, $1.41; and
For third-class commodities, $1.16.

That the above and foregoing rates were fixed by the Railroad Commission pursuant to the authority vested in it by said House Bill No. 335 to establish the minimum rates to be charged by contract carriers for transportation services, which said rates are in no event to be less than those charged by common carriers for substantially the same service; that the rates above set out apply to the transportation of said commodities between said points to contract carriers and common carriers alike.

This affidavit was made on the 31st day of August, A. D. 1931.

AFFIDAVIT OF J. C. CARRINGTON

That he is President of the Texas Truck Owners Service Bureau, a Texas corporation, and being an organization maintained for the purpose of rendering services of a varied nature to owners and operators of motor truck vehicles in the State of Texas, said organization having approximately eight hundred members of which approximately six hundred are contract carriers.

That on September 1, 1931, while engaged in one of the several conferences he has recently had with Mark Marshall, Director of Motor Transportation of the Railroad Commission of Texas, the said Mark Marshall advised him that he should issue advices for the benefit of the various subscribers and members of his organization to the effect that each and every provision of House Bill No. 335, passed by the Legislature of Texas in 1931, and which became a law on August 22, 1931, would be strictly enforced; that orders have been passed by the Railroad Commission specifying [fol. 256] the minimum rates to be charged by contract carriers, and that a bulletin had been issued by his department to that effect, and that any contract carriers charging a rate less than that prescribed would be prosecuted; also that various provisions of said Act relating to the filing of insurance policies for cargo insurance, workmen's compensation et cetera, as well as provisions relating to the obtaining of drivers' licenses and the employment of drivers for a certain number of hours, as set out in said Act, and the keeping of a set of accounts as set out in said Act, would be in all respects strictly enforced, and that any violation of said Act in any manner or respect would be prosecuted.

That the said Mark Marshall advised him, for the benefit of the members of his organization, that the strict enforcement as mentioned in the foregoing paragraph would be made, and that the Railroad Commission would take such steps as it deemed necessary to bring about an absolute compliance on the part of every contract carrier, with each and every provision of said Act relating to contract carriers.

This affidavit was signed and sworn to on the 2nd day of September A. D. 1931.

GENERAL ORDER OF THE RAILROAD COMMISSION OF TEXAS

General Order No. 26

Austin, Texas, August 22, 1931.

Whereas, Chapter 314 of the General Laws of the State of Texas, passed by the 41st Legislature, Regular Session, as amended by Chapter 24 of the General Laws of the 2nd Called Session thereof, having been further amended by

Chapter 277 of the Acts of the 42nd Legislature, Regular Session, by declaring all persons, firms, co-partnerships, corporations, companies, associations and joint-stock associations, other than contract carriers, engaged in the transportation of property for compensation or hire over the highways of Texas, to be motor carriers;

And whereas, said above mentioned Act imposed upon the Railroad Commission of Texas the duty to fix, prescribe or approve the rates and charges of such motor carriers, as well as to fix, prescribe or approve just and reasonable rules [fol. 257] and regulations to be observed by such motor carriers,

It is therefore ordered by the Railroad Commission that all rates, ratings, rules and regulations heretofore prescribed or approved by it for the government of the transportation of property by Class A. motor carriers over the highways of Texas, be and they are hereby amended, so as to hereafter apply with equal force to "Motor Carriers" as hereinabove defined.

Effective 12:01 o'clock A. M. August 22, 1931.

Railroad Commission of Texas. C. V. Terrell, Chairman; Lon A. Smith, Pat M. Neff, Commissioners.

Attest: C. F. Petet, Secretary.

Attached to the above general order is a certificate by C. F. Petet to the effect that the same is a true and correct copy of the original on file in the office of the Railroad Commission of Texas.

The sworn bills of complaint of J. H. Stephenson, original complainant, and W. S. Finnegan, P. E. Arnett and D. A. Beard, complainant-Intervenors, were introduced in evidence, but in view of their appearance in toto in another part of this record, they will be made a part of this statement of evidence presented to the court by reference thereto.

The bill of complaint of J. H. Stephenson, original complainant, appears on pages — et seq. of this record.

The bills of complaint of W. S. Finnegan and P. E. Arnett, complainant-intervenors, appear on pages — et seq. of this record.

The bill of complaint of D. A. Beard, complainant-intervenor, appears on pages — et seq. of this record.

[fol. 258] AFFIDAVIT OF COMPLAINANT J. H. STEPHENSON—
Filed March 19, 1932

That on or about March 1, A. D. 1931 he entered into a verbal contract with the Southwest Freight Company, Inc., with offices at Houston, Harris County, Texas, under the terms of which he was to begin transporting immediately over the highways of the State of Texas from the City of Houston, Harris County, Texas, to the City of San Antonio, Bexar County, Texas, all the freight moving in the service of the Southwest Freight Company Inc., and reaching said company via the Morgan Line from New York, N. Y. and via the Southern Steamship Company from Philadelphia, Pennsylvania; and that at said time a definite rate to which he would be entitled for said transportation services was agreed upon; that thereafter the agreement he had with Southwest Freight Company, Inc., was reduced to writing; the same being in the nature of a letter written by said Southwest Freight Company Inc., to complainant, and in which a full confirmation of the verbal agreement was made, said letter reading in words and figures as follows to wit:

Southwest Freight Company, 1011 Marine Bank Building, Houston, Texas

March 2nd, 1931.

Mr. J. H. Stephenson, Houston, Texas.

DEAR SIR: This letter is to confirm the verbal contract of this date entered into between us, whereby we, the Southwest Freight Company Inc., have agreed and contracted with you to give you the truck haul from Houston Texas to San Antonio Texas on all freight moving in our service and reaching us via the Morgan Line from New York N. Y. and via the Southern Steamship Company from Philadelphia, Pa.

It is hereby understood and agreed between us that you will enter into no contract with any other forwarding company, without first securing our permission and consent to do so. It is further hereby agreed that this contract and agreement will remain in force for a period of one (1) year.

Your proportion of the revenue on through business will be sixty-one cents (61¢) per hundred pounds, regardless of the amount of tonnage that may be offered you at any one time. It is further agreed and understood that you will carry the necessary Cargo Insurance and on any claims that may arise, involving concealed loss, the claims will be prorated on basis of revenue and you will be expected to pay your proportion of such claims and on any claims due to lose where we, or our agents, have a clear receipt from you, you will be entirely responsible for any such claims that may accrue.

You, on your part, agree to give over-night service from Houston to San Antonio and you further agree to furnish closed equipment, such as will meet with our approval.

[fol. 259] Southwest Freight Company, Inc. (Sgnd.) S. J. McDonnell.

Approved.

(Sgd.) T. R. Rogers, President.

Accepted.

(Sign-d) J. H. Stephenson.

That he began operating immediately trucks over the highways of the State of Texas in pursuit of his obligations as contained in the hereinabove set out contract and that in order to fulfill his obligations therein contained and to render the character of service required of him in said agreement, it was necessary for him to acquire considerable equipment, to wit: Three (3) trucks, with semi-trailers, together with other equipment incidental and necessary to the proper and successful operation of said trucks, and representing an investment of over $15,000.00. That said trucks were fully equipped in strict accordance with all the laws of the State of Texas relating to the operation of trucks on the highways of the State of Texas, were duly and legally licensed, and were at all times and in all manners, respects and particulars operated over the highways of the State of Texas in absolute conformity with all the laws appertaining to the operation of such character of trucks over the highways. That he has transported many carloads of commodities under the terms and provisions of said contract and that he has been paid, from the time he began operating under said contract until the present

time, the rate and charge of sixty-one cents (61¢) per hundred pounds, regardless of the amount of tonnage and commodity transported; that said rate of sixty one (61¢) per hundred pounds specified in said aforesetout contract is the only compensation and pay he receives from said Southwestern Freight Company Inc., for the transportation of said freight; that under the terms of said contract and the rate to be paid for said transportation services, he will earn and receive at least the sum of Ten Thousand Dollars ($10,000.00), which said sum represents the actual profit accruing to him out of said contract after operating expenses and overhead are deducted and due allowance made for depreciation of equipment.

That the contract hereinabove set out is the only contract under which he operates in carrying or transporting commodities over the highways of the State of Texas and that his said transportation of commodities over the highways [fol. 260] of the State of Texas has at all times been confined to private contract hauling,—he having been at no time engaged in the carriage of commodities as a common carrier.

That if the Act of the Legislature passed in 1931 and known as House Bill 335, is enforced against him, he will sustain a loss of several thousand dollars he would otherwise earn and collect under said contract, and furthermore will lose a substantial amount of money on the investment made as an incident to the proper carrying out of the conditions of said contract amounting to several thousand dollars.

Affiant says that he has, without delay or interruption made delivery of all freight moving in the service of Southwest Freight Company Inc., and reaching said company by way of the Morgan Line, from New York and the Southern Steamship Company, from Philadelphia, Pennsylvania, and which he loaded on his trucks at the docks of said two steamship companies at Houston, Texas, to the Southern Transfer Company warehouse at San Antonio, Texas and that he at all times fully complied with his agreement to give overnight service from Houston to San Antonio. That during the time his trucks were operated under this contract, he faithfully performed said services of transportation so as to satisfy said Southwest Freight Company Inc.,

with prompt and efficient deliveries. That at no time did his trucks or any one of them have an accident of any kind or character upon the highways of the State of Texas, while engaged in said transportation. In this connection affiant says that upon the expiration of the term of said contract, said Southwest Freight Company Inc., would give him a renewal thereof, were it not for the inhibitions contained in said House Bill 335.

Affiant further says that said House Bill No. 335 will prohibit him from further pursuing and carrying out the terms, provisions and conditions of the contract hereinabove set out and will preclude him from pursuing the lawful occupation of transporting goods, wares and merchandise over the highways of the State of Texas under a contract as a private carrier.

That if said Act is enforced against him, it will necessarily result in his being divested and deprived of the money he would otherwise have earned under and by virtue of the said contract, and will likewise result in the loss to [fol. 261] him of the large sum of money which he spent and invested in purchasing the equipment used in operating under said contract, by reason of the fact that said equipment cannot be used profitably by him for any other lawful purpose in the State of Texas; that said property will greatly depreciate in value, by reason of the fact that many persons, firms and corporations throughout the State of Texas would be in the same position as he is; that is, have such equipment on their hands without being able to put same to a lawful use, and necessitating the dumping of said equipment on the market for sale, and resulting in the bringing about of an extremely low market value for said trucks and equipment. That an enforcement of said House Bill 335 will mean a destruction of his business.

That affiant transports under said contract, various and sundry commodities, the same falling within one of the first four classes of the classification of commodities made by the Railroad Commission, and as to which said classes the Railroad Commission has established a definite and fixed rate to be charged for the transportation of same by common carriers. That the minimum rate that can be charged by affiant under the schedule now in force and effect under the orders of the Railroad Commission, for

transportation of such commodities as affiant hauls from Houston to San Antonio under said contract, and being the first four classes of commodities, is as follows:

For first class commodities, being class No. 100, $1.11 per hundred pounds;

For second-class commodities, being class No. 85, $.94 per hundred pounds;

For third-class commodities, being class No. 70, $.78 per hundred pounds;

For special commodities, being classes Nos. 65 and 60 $.72 and $.67 per hundred pounds, respectively; and

For fourth-class commodities, being class No. 55, $.61 per hundred pounds.

Affiant says that he has at the present time and has had for some time in the past, six employees in his employ; that all of said employees are engaged in the operation of said trucks in the transportation of the commodities as per his contract with Southwest Freight Company Inc.; that he [fol. 262] has not in the past nor does he at this time carry any workmen's compensation insurance and that he has no intention of purchasing or taking out such character of insurance.

That affiant has been threatened with arrests and prosecutions upon his failure to comply fully with all the provisions of said House Bill 335.

[File endorsements omitted.]

AFFIDAVIT OF INTERVENORS V. C. BILBO, J. C. CARROLL, AND A. S. ROBINSON—Filed March 19, 1932

That affiants are all residents of Dallas, Dallas County, Texas, and are engaged in the business of transporting commodities for hire over the highways of the State of Texas, for the Great Atlantic & Pacific Tea Company exclusively. That they are transporting for said Great Atlantic & Pacific Tea Company under a contract specifying the rates to be charged, the character of service to be rendered, etcetera. That they have been engaged as private contract carriers and operating in pursuit of said contract for about four years next preceding the effective date of

House Bill No. 335. Under the terms of this contract, affiants transported from the general warehouse of the Great Atlantic & Pacific Tea Company, herein after referred to as A. & P. Company to its branch stores in the State of Texas and within a radius of 230 miles from Dallas, Dallas County, Texas. That such transportation included merchadise, supplies and commodities of every kind and character handled by the various retail stores of the A. & P. Company. That their operations as contract carriers are exclusively pursuant to said agreement with said A. & P. Company and are under an agreed schedule of rates. That the rates and charges collected and received by affiants from said A. & P. Company are usually less than the minimum rates prescribed by House Bill 335 and the Railroad Commission of Texas for such transportation services.

That affiant Bilbo operates approximately eighteen trucks and has in his employ about thirty-five or forty men, all of whom are employed in connection with this affiant's operation as a contract carrier under said agreement with [fol. 263] said A. & P. Company.

That affiant J. T. Carroll operates about twenty-three trucks and has in his employ about thirty-five men as drivers of said trucks, all in pursuance of said agreement with said A. & P. Company and that affiant A. S. Robinson operates about two trucks and employs two drivers in connection with the carrying out of his said agreement with said A. & P. Company.

Said affiants Bilbo, Carroll and Robinson allege that in 1929 they applied for and received a "Class B Permit" from the Railroad Commission. That in the year 1930 the Railroad Commission advised them that their operations came clearly within the classification of a contract carrier and that they did not need a permit, and requested of them to send in all permits, tags and other evidences of their "Class B Permits" and for them to continue to operate as a contract carrier. That each of said affiants complied with said request of said A. & P. Company and surrendered their said "Class B Permits". That thereafter, affiants continued to operate their said trucks without a "Class B Permit", but purely as a contract carrier, until August 22, 1931, the effective date of House Bill No. 335, and that just prior to the time said House Bill No. 335

became a law, affiants had a conversation with a Mr. Miller, Inspector for the Railroad Commission, and Mr. Miller ordered and instructed affiants and each of them to desist and refrain from conducting any operations as a contract carrier over the highways of the State of Texas after August 22, 1931, and to continue to cease such operations until they had been granted a permit by the Railroad Commission under the terms and provisions of said House Bill No. 335, and further advised and informed affiants and each of them that any effort on their part to conduct their operations in violation of his said orders and instructions would result in their being arrested, prosecuted and subjected to the infliction of a severe fine and penalty. That after receiving said orders and instructions from Inspector Miller, affiants abandoned and ceased all operations of their said trucks over the highways of the State of Texas, and immediately took steps to obtain a permit from the Railroad Commission under said House Bill 335. That their said applications were made in absolute conformity with the manner and form as provided by said Act and were accompanied with the requisite fee and that the receipt of [fol. 264] their said applications was acknowledged in writing by said Railroad Commission and affiants were notified that a hearing on their applications was to be held at Dallas on November 3, 1931. That affiants were prepared to present their said applications on said date and to offer proof in support of their right to obtain such permits, but because of the request made by an attorney representing a common carrier who was desirous of contesting affiants applications for permits the Commission continued the hearing and deferred it until a future date—all of which was done without the consent of affiants or their attorney. That thereafter affiants were advised by one of the members of the Railroad Commission, namely, Commissioner Neff, that if they would appear in Waco the following week, their said applications might be reached for hearing, and although affiants went to Waco the following week for the purpose of presenting their applications they received no hearing. From Waco one of the Commissioners and Mr. Marshall, who held some of the hearings and who is Chief of the Transportation Division of the Railroad Commission of Texas, returned to Austin, Texas and al-

though affiants followed them to Austin and attempted to obtain a hearing they received none, but were advised that perhaps their said applications might be reached at Dallas at a later date.

Affiants Bilbo, Carroll and Robinson state that the large investment they have in the number of trucks they operated pursuant to their said agreements with the A. & P. Company is now practically a total loss to them by reason of the fact that there is no market for second-hand trucks and said affiants, by reason of said loss together with the enormous loss they are suffering by reason of being without a means of income, have each sustained a loss of thousands of dollars and more particularly well in excess of the amount of Three Thousand Dollars to each of said affiants.

Affiants say that the provisions of House Bill No. 335 passed by the 1931 Legislature of Texas will prohibit them from further pursuing and carrying out the terms and provisions of their respective said contracts with the A. & P. Company and will preclude them from pursuing their occupation of transporting commodities for hire over the highways under their said contracts as private carriers.

[File endorsement omitted.]

[fol. 265] AFFIDAVIT OF W. S. FINNEGAN AND P. E. ARNETT—Filed March 19, 1932

That they are at this time engaged in the carriage of commodities over the highways of the State of Texas conducted under private contracts and solely as contract carriers.

Affiant Finnegan states that on or about April 23, 1931 he entered into a contract with West Texas Motor Freight Lines with offices at Houston, Harris County Texas, under the terms of which he was to begin transporting immediately over the highways of the State of Texas, from the city of Houston, Harris County Texas, to the city of Dallas, Dallas County Texas, and to certain points in the Valley to wit: San Benito and Brownsville, in Cameron County and McAllen in Hidalgo County Texas, commodities moving to said points, and that a definite rate he was to receive for

said transportation services was agreed upon to wit: Forty five cents (45¢) per hundred pounds for all of said commodities he carried by motor truck to Dallas irrespective of size of load and character of commodity and fifty cents (50¢) per hundred for all of said commodities he carried by motor truck to any of said three above mentioned points in Cameron and Hidalgo Counties, irrespective of class of commodity or quantity of load. It was further agreed that affiant should be entitled to a rate of thirty five cents (35¢) per hundred for all commodities carried in his motor truck from Brownsville, Cameron County, Texas to Houston, Harris County, Texas on return trips. As a part of said contract affiant Finnegan obligated himself to render immediate transportation services. That all of said commodities he transports from Houston to Dallas, Cameron and Hidalgo Counties as aforesaid are interstate shipments, reaching Houston over certain steamship lines.

Affiant Arnett states that about two years ago he entered into a contract with Linde Air Products of Texas, with offices at Houston, Harris County, Texas, under the terms of which said intervenor was to begin transporting immediately over the highways of the State of Texas, by motor truck from the city of Houston, to points throughout the State of Texas, and principally Beaumont and Port Arthur in Jefferson County, Texas, certain commodities consisting of oxygen cylinders, acetylene cylinders, carbide drums and rods in one hundred pound bundles; that said agreement provided for immediate transportation [fol. 266] services; that he is at this time engaged in transporting said commodities as per said contract, and that under the terms and provisions of said contract, it is necessary for him to make deliveries of said commodities without delay.

That the contracts of both of said affiants are valid and existing contracts. That their transportation of said commodities is in violation of House Bill 335, passed by the 1931 Legislature of Texas, and that if the provisions of said Act are enforced as against affiants, each of them will be compelled to abandon the pursuit of his said business, as well as the fulfillment of his said contract.

That immediately upon the consummation of the above mentioned contract with West Texas Motor Freight Lines,

affiant Finnegan, in order to be in position to carry out fully the provisions of said contract in all matters and respects, purchased equipment of the value of Four Thousand Dollars ($4,000.00) and Intervenor Arnett in order to be in position to carry out fully the provisions of his said contract, acquired equipment of the value of Six Thousand Dollars ($6,000.00). That said *contracts* were fully equipped in strict accordance with all of the laws of the State of Texas relating to the operation of trucks on the highways of the State of Texas, were duly and legally licensed and were at all times and in all manners, respects and particulars operated over the highways of the State of Texas in absolute conformity with all laws appertaining to the operation of such character of trucks over the highways. Affiant Finnegan says that under the terms of said contract and the rate to be paid him for said transportation services, he will earn and receive at least the sum of Three Thousand Five Hundred Dollars ($3,500.00) which said sum represents the actual profit accruing to affiant out of said contract after operating expenses and overhead are deducted and due allowance made for depreciation of his equipment; affiant Arnett says that under the terms of his contract and the rate to be paid him for said transportation services he will earn and receive at least the sum of Six Thousand Dollars ($6,000.00) which sum represents the actual profit accruing to said affiant out of said contract after operating expenses and overhead are deducted and due allowance made for depreciation of his equipment.

[fol. 267] Affiant Finnegan says that on August 22, A. D. 1931, the effective date of the Act complained of herein, the Railroad Commission of Texas passed and promulgated its General Order No. 26, which said order, regulation and rule reads in words and figures as follows towit:

Whereas Chapter 314 of the General Laws of the State of Texas, passed by the Forty-First Legislature, Regular Session, as amended by Chapter 24 of the General Laws of the Second Called Session thereof, having been further amended by Chapter 277 of the Acts of the Forty-Second Legislature, Regular Session by declaring all persons, firms co-partnerships, corporations, companies, associations and joint stock associations, other than Contract Carriers engaged in the transportation of property for com-

pensation or hire over the highways of Texas to be Motor Carriers.

And whereas, said above mentioned Acts imposed upon the Railroad Commission of Texas the duty to fix, prescribe or approve the rates and charges of such Motor Carriers, as well as to fix, prescribe or approve just and reasonable rules and regulations to be observed by such Motor Carriers.

It is therefore ordered, by the Railroad Commission that all Rates, Ratings, Rules and Regulations heretofore prescribed or approved by it for the government of the transportation of property by "Class 'A' Motor Carriers" over the highways of Texas, be and they are hereby amended, so to hereafter apply with equal force to "Motor Carriers", as hereinabove defined.

Effective 12:01 o'clock A M. August 22, 1931.

Railroad Commission of Texas. C. V. Terrell, Chairman; Lon A. Smith, Pat M. Neff, Commissioners.

Attest: C. F. Petet, Secretary.

That under said above General Order No. 26, wherein the rates, ratings, rules and regulations theretofore prescribed and approved by said Railroad Commission of Texas, for the government of the transportation of property by "Class 'A' Motor Carriers" over the highways of the State of Texas were by express adoption made applicable to contract carriers, such as affiant Finnegan, said affiant Finnegan, in assessing charges and rates for the transportation of said commodities between Houston and Dallas and between Houston, San Benito, McAllen and Brownsville, notwithstanding the rates definitely agreed upon and contracted for in his said contract, is subjected to and *and* compelled under penalty of the law to abide by the following minimum rates; For first class commodities to Dallas, $1.23 per hundred; to San Benito, $1.62 per hundred; to McAllen, $1.66 per hundred; and to Brownsville $1.67 per hundred. For second class commodities to Dallas, $1.05 per hundred; to San Benito $1.38 per hundred; [fol. 268] to McAllen $1.41 per hundred; and to Brownsville $1.42 per hundred. For third class commodities to Dallas, $.86 per hundred; to San Benito $1.13 per hundred;

to McAllen $1.16 per hundred and to Brownsville $1.17 per hundred. That under the express provisions of this Act, affiant Finnegan is bound by law to charge for said services of transportation rates not less than those heretofore set out, which are two and three times as much as the rates he is bound by under his said contract.

Affiant Finnegan says that the contract with West Texas Motor Freight Lines hereinabove mentioned is the only contract under which he operates in carrying or transporting commodities over the highways of the State of Texas, and that his said transportation of commodities over the highways of the State of Texas has at all times been confined to private contract hauling—he having been at no time engaged in the carriage of commodities as a common carrier.

Affiant Arnett says that the contract with Linde Air Products Company, hereinabove mentioned, is the only contract under which he operates in carrying or transporting commodities over the highways of the State of Texas, and that his said transportation of commodities over the highways of the State of Texas has at all times been confined to private contract hauling—he having been at no time engaged in the carriage of commodities as a common carrier.

That the contracts which said affiants hold do not require them to carry any kind or character of insurance or enter into any kind of bond for the protection of the parties with whom they have contracted or any other person who has an interest in the commodities they transport and that consequently they do not carry any cargo insurance.

Affiants say that they have been threatened with arrests and with prosecutions for any violations of said House Bill 335 and for operating their said vehicles without the permit required under said Act, and for charging and receiving a rate less than the minimum rate prescribed by said Act and by the Railroad Commission of Texas.

Affiants say that if the provisions of said House Bill 335 are enforced as against them, each of them will lose his respective said contract and his business of transporting [fol. 269] as private contract carrier will be entirely destroyed. That as a consequence his investment will also be largely destroyed.

[File endorsement omitted.]

AFFIDAVIT OF B. E. ITES—Filed March 19, 1932

THE STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, a Notary Public in and for Harris County Texas, on this day personally appeared B. E. Ites of Houston, Harris County Texas, who after being by me duly sworn upon his oath stated:

That since the year 1929 he has been engaged in the business of operating motor trucks over the highways of the State of Texas. That on April 4, 1931, he entered into a contract with Herrin Transfer & Warehouse Company, with headquarters in Houston, Harris County, Texas, under the terms of which affiant was to haul by motor truck miscellaneous merchandise for said Herrin Transfer & Warehouse Company of Houston, Harris County, Texas. That from and after said date affiant continued to transport in pursuance of said contract until August 22, 1931, the effective date of House Bill No. 335 passed by 1931 Legislature of the State of Texas, at which time said Herrin Transfer & Warehouse Company cancelled and annulled said contract for the reason that affiant had no permit to operate after said date, and for the further reason that affiant was thereafter compelled to transport at rates fixed by the Railroad Commission, which said rates were in excess of those he had agreed to in said contract. That affiant, under the terms of said contract, was transporting said merchandise at a flat rate of sixty-five cents per hundred pounds, and in view of the fact that the commodities transported consisted of many different kinds of merchandise, ranging from class one to class four inclusive, his said rate was in some instances considerable less that that prescribed by the Railroad Commission.

Affiant further says that prior to the effective date of said House Bill No. 335, he had no Class "B" permit and [fol. 270] there was no occasion for him to then have such a permit, and that he did not come within the statutory provisions applicable to those operators known as "Class B Operators". That on April 4, 1931 and August 10, 1931 affiant purchased two new Chevrolet Trucks, with semi-trailer, representing an investment of $3000, both of which said trucks were used pursuant to the carrying out of said

contract he had with Herrin Transfer & Warehouse Company. That he was paying for said two trucks in monthly installments of approximately $203.00 on both trucks; that there remains a balance of $1,100 owing by affiant on the purchase price of said two trucks, and that he is now in arrears one payment in the sum of $203. That affiant has been notified by his said creditor from whom he purchased said trucks that unless he would be in position to meet said payments of $203 per month promptly said trucks would have to be by him repossessed and taken back in cancellation of the indebtedness against them. That affiant was paying for said trucks out of the moneys he received under the contract he had with Herrin Transfer & Warehouse Company, and he is now unable to continue the payments already due and coming due on said trucks, unless he can resume his said business of transporting as a contract carrier over the highways of the State of Texas.

In this connection affiant further says that he can resume the operation of his said two trucks under contract with Herrin Transfer & Warehouse Company if he can do so without having to obtain a permit and without having to submit to charging only such rates as are permitted under the rulings of the railroad Commission. That affiant was having a gross income of approximately $400 a month as a result of his operations under said contract with Herrin Transfer & Warehouse Company and that this income provided him with a means of support for himself and family and permitted him to meet his obligations and payments on said trucks with promptness.

Affiant further says that he is now without income—is unable to provide for himself and family and has been unsuccessful in gaining employment of any kind or character. That he has no way of protecting his equity in said two trucks, as there is no market for trucks at this time, and although he has made several efforts to sell his trucks so as to realize even a small amount of his equity, he has met with failure. That he has no means at hand whereby he can arrange to hold on to his trucks but will in all probability have to release them to the mortgagee within the next two or three weeks. Affiant further says [fol. 271] that although he had already lost his contract with Herrin Transfer & Warehouse Company because of

the reasons heretofore mentioned, he attended the session of the Railroad Commission held in Houston, Harris County, Texas, on November 3, 1931, in the hopes that perhaps he could obtain a permit and then obtain a contract from some other shipper willing to pay such rates as the Railroad Commission would prescribe. That upon attending said session however, he found that it was necessary for him to employ an attorney in order to have a hearing upon his application in that a number of railroad attorneys, interurban attorneys and common carrier attorneys were present, attacking every application that was made; that because of the rulings made by the Railroad Commission as to matters necessary for him to show and prove before he would be entitled to a permit, and because of the fact that it was plain to see that it would take at least a month or two months before he could obtain any final decision on his application, affiant made no further effort to secure a permit.

Affiant further says that he made strict compliance with each and every provision of House Bill No. 335 by purchasing contracts of insurance of the various kinds prescribed by said Act and by obtaining licenses for his drivers, and that he has been refused the right to operate his said trucks over the highways of the State of Texas, because he did not hold the permit prescribed by said Act and did not charge the rates prescribed by the Railroad Commission.

That affiant was threatened with arrest and prosecution by a Mr. Scott, Inspector of the Railroad Commission, for operating his said trucks without a permit and was ordered to discontinue all operations.

Further affiant saith not.

Barnett E. Ites.

Sworn to and subscribed before me this the 13th day of November, A. D. 1931. Bess Y. Beaty, Notary Public in and for Harris County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 272] **Affidavits and Exhibits Introduced by Respondents**

AFFIDAVIT OF A. J. STONE

I have had twenty five years' experience in the railroad transportation business, having served in various capacities in connection with the transportation of commodities by railroad, and I am familiar with the method of arranging the freight rate schedules so as to obtain the necessary revenue to support the railroad transportation facilities. During the past twelve years, I have not been in anywise connected with any railroad, but my work during that time has been in connection with the handling of transportation matters for the shipping public and at the present time I am in active charge of the Traffic and Transportation Department of the Dallas Cotton Exchange, being Secretary of that body. It is my experience in the arranging of freight traffic charges for railroads that they are so designed as to give to the publis a general scheme of rates which would permit all kinds of commodities to move in commerce, such as low grade commodities like sand, gravel and coal—and high grade commodities like dry goods and automobile tires. The value of the commodity and its ability to stand transportation charges plays an important factor in the amount of the freght rates exacted for the transportation service. It is my judgment that through no other method can the low grade commodities such as sand and gravel, coal, grain and farm products in general et cetera, be permitted to move in commerce at rates which that character of traffic could reasonably bear and be absorbed by the consuming public.

Unquestionably, if the transportation by the railroads of high grade commodities and the revenues they receive for such service are to be demoralized by improperly regulated and cut throat competition, and thereby they are deprived of the high grade traffic which, taken together with all other traffic, affords the rail carriers an adequate revenue, but are forced to continue to transport low grade commodities, one result is inevitable, namely that the railroads will be forced to raise the rates on the transportation of all low grade commodities.

[fol. 273] This result in my opinion, is inevitable, and will unquestionably deprive the low grade commodities of an opportunity to move to consuming markets.

The seriousness of this situation to the public in general is illustrated by the actual figures dealing with the existing transportation by motor truck as compared with the figures covering existing transportation by railroads.

For the purpose of showing the serious nature of permitting the motor trucks to use the highways unregulated for the purpose of depriving the railroads of the high-grade traffic, I have investigated the records of the Railroad Commission of Texas to determine the relative position of the two methods of transportation.

First: I made a study of the railroad's figures for the year ending December 31, 1928, and found that the average per ton revenue of all railroads in the State of Texas for all traffic handled was $2.02 per ton, and further that the average revenue of the motor trucks reporting to the Railroad Commission of Texas, was $8.56 per ton for all classes of traffic handled by such motor trucks. From these figures, it is obvious that the motor trucks are handling a high class selected traffic. Based upon the motor trucks' average figure of $8.56 per ton, I studied the figures of the railroads for the year ending December 31, 1928, to determine how much of their traffic would render that amount of revenue per ton on the average, and I included all commodities which paid the railroads as much as $5.00 per ton and over on the average. I find that the Class I railroads of the State of Texas for the year ending December 31, 1928, had a gross revenue, of $216,775,491.00. I further find that 63.55 per cent of this revenue came from traffic which paid the railroad $5.00 per ton or greater.

I find that the Class I railroads for the State of Texas for the year ending December 31, 1928, carried a great traffic of 89,920,743 tons.

I further find that only 20.34 per cent of those tons actually paid the railroads $5.00 per ton or greater. It is obvious on this basis that without regulating the competition between the carriers by highway and the carriers by rail, the State of Texas is going to find itself face to face with [fol. 274] the problem of the railroads left with eighty per cent of their traffic and thirty-seven per cent of their reve-

nue. In other words, the freight revenue per ton of the railroads and the freight revenue per ton of the motor trucks indicate that the motor truck competition is capable of taking from the railroad common carriers sixty-three per cent of their revenue but that the motor trucks are only capable of handling twenty per cent of the tonnage, thus leaving for the railroads eighty per cent of the tonnage with only thirty-seven per cent of the revenue. In my judgment it is obviously impossible for the railroads to perform eighty per cent of their transportation service upon the basis of thirty-seven per cent of their present revenue. Either one or two things must happen. The freight rates on low grade commodities must be increased, or the railroads will be forced into bankruptcy. In my judgment, many of the low grade commodities cannot be moved into the consuming market upon increased charges. And furthermore, if the charges were increased to any great extent, there would be a further shift of the traffic to the highways. It is my opinion that the State must, in order to maintain adequate transportation facilities for the public, regulate the rates and charges of the so-called contract carriers by motor truck. By no other method can the State provide an adequate transportation system for the commerce of the State of Texas.

Affidavit of F. W. Ruby

That he is a citizen and resident of Bexar County, Texas, and is operating motor freight lines over the highways of the State of Texas between the points of San Antonio to Waco via Austin. That he has applied for and secured from the Railroad Commission of Texas certificates of public convenience and necessity authorizing him to operate such motor transfer lines in accordance with the rules and regulations of the Railroad Commission of Texas; that his motor freight lines are classified as common carriers and designated by law as a "Class "A" operator; that he is familiar with the conditions, both with respect to trade and transportation in and along the routes over which he operates his motor truck lines; that he is familiar with the kind and character of traffic originated at and destined to the points served by his carriers; that the said motor

[fol. 275] freight lines have been in operation for several years prior to the establishment of the laws requiring permission from the Railroad Commission to operate the same; that in accordance with the rules, regulations and tariffs as issued by the Railroad Commission of Texas, he has been operating in this territory and charging such rates and giving the service as therein provided; that during this period of operation of these motor truck lines, there has grown up a class of carrier known generally as "contract carrier"; that these carriers have not any restrictions or regulations with reference to the rates to be charged or the service to be rendered by them; that th*ses* contract carriers operate over the same routes and in the same territory as motor freight lines under his direction and control; that his lines are restricted by the rules, regulations and rates as provided and promulgated by the Railroad Commission of Texas, and are bound to carry the traffic tendered to them in compliance therewith; that said contract carriers are in direct competition with him, but are without the restrictions governing his operations, and therefore these contract carriers are carrying freight which normally would belong to his motor freight lines; that the rates and service they offer cannot be met by motor freight lines and therefore he suffers the loss of this traffic; that the number of these contract carriers during the period he has been operating, has been vastly increased, and that if the same are not brought within the regulation of the Railroad Commission as provided by the recently enacted law known as House Bill 335 but are permitted to carry on their operations unmolested, the motor freight business will b*c*ome in such condition that it will be impossible for such motor freight lines as are controlled by affiant herein, to operate their business, and will have to withdraw from such participation, leaving the highways of Texas to be used and abused by a class of carriers who have no restrictions, and in the opinion of affiant will be of great detriment not only to regulated carriers moving traffic of this kind but to the general public as well.

Affidavits to the same effect as the foregoing by affiant Ruby were also made by the following:

[fol. 276] D. C. Sanders, operating a motor freight line over the highways of the State of Texas between the following points: Dallas to Midland via Abilene; Dallas to San Angelo, via Abilene;

H. P. Brown, operating motor freight lines over the highways of the State of Texas between the following points: San Antonio, Houston and Rio Grande Valley;

L. C. Abbott, operating motor freight lines over the highways of the State of Texas, between the following points: Dallas, Fort Worth, Weatherford, Milsap, Mineral Wells, Palo Pinto, Caddo, Breckenridge, Albany, Strawn, Ranger, Eastland, Alden, Cisco, Baird, Abilene and points west and south through connecting carriers;

M. S. Day, operating motor freight lines over the highways of the State of Texas between the following points: Houston to Palestine and intermediate points, Madisonville and Groveton.

Affidavit of Robert Mayer

I am engaged in the cotton exporting business in the State of Texas, and have had experience in the purchasing and buying of cotton in competition with other cotton merchants who transport their commodities by motor truck. I have also had experience in transporting cotton by motor truck and in making contracts with motor trucks for the purpose of handling cotton for my account. I am familiar with what is known as a contract carrier, who undertakes to handle cotton under a contract for a limited number of shippers, or for an individual owner and shipper.

These so-called contract carriers do in fact make contracts between themselves and one shipper, but the facts are also that said motor truck carriers will make the same character of contract with any and all shippers having cotton or other commodities for transportation to the ports. While it is true that any one individual contract may be a contract between the motor carrier and one shipper or owner of the cotton, it is also true that as soon as the performance of that particular contract is completed, a motor truck carrier will and invariably does offer to handle cotton for other shippers under the same arrangement.

The so-called "motor truck carriers" that have come [fol. 277] under my observation do in fact handle the cotton traffic for anybody who has cotton to ship. The co-called "contract carriers" have no uniform prices as between different shippers. They discriminate in their rates and services as between shippers of the same commodity for identically the same service. The condition with regard to this discrimination in freight rates and service has become so marked that it is demoralizing the competition between the different markets and the different cotton shippers in the handling of the cotton traffic of this day. The inability to know what the charges are for the transportation of cotton from a given point to the port has made the business so uncertain as to become an unprofitable undertaking. These so-called contract carriers have no standard rates and are charging whatever they can demand under the circumstances of each individual instance, with the result that there is no stability in charges for the transportation of cotton by motor truck upon which future purchases of the commodity may be predicated.

The conditions surrounding the Transportation of cotton by the so-called contract carriers are demoralizing the cotton business itself, and are demoralizing the transportation of cotton by motor truck, as well as the transportation of cotton by railroad, unless some regulation of the rates and charges be effected by state authority, the cut throat competition between the different contract carriers will ultimately destroy the small interior cotton market, as well as the transportation of cotton by legitimate responsible motor transportation companies.

Affidavits to substantially the same effect were also made by the following:

Geo. V. Lowney, engaged in the cotton merchandising business;

H. C. Helwig, Traffic Manager for Japan Products Company;

Roger T. Dixon, cotton merchandising business;

D. N. Parker, cotton exporting business;

J. C. Ownby, cotton merchandising business;

James T. Hunt, cotton merchandising business.

Certificate of C. F. Petet, Secretary of the Railroad Commission

The records of the Railroad Commission show the following facts for the year ending December 31, 1930:

Number of Class A Truck operators, 486.
Number of Class A Truck licenses, 1,317.
Tonnage carried by Class A trucks, 450,537.16 tons.
Number of Class B operators of trucks, 1,507.
[fol. 278] Number of Class B Trucks operated, 2,395.

Class B operators were not required to report to the Commission the tonnage carried; thence such information is not available;

The number of bus certificates issued was 363;
The number of bus operators was 138, and
The number of busses in service was 834.

The number of passengers hauled by bus operators was 4,388,150. The total investment of motor bus operators was shown to be $22,771,773.37, and the number of truck miles operated was 41,200,103.

None of these figures cover operations by truck owners who carried their own commodities and the figures cover only carriage for hire.

Affidavit of E. M. Davis

I live at Brownwood, Brown County, Texas. During 1925 to 1930 inclusive, I was County Judge of Brown County, and also President and Secretary of the County Judges' and Commissioners' Association of Texas. I am now a member of the Legislature of Texas. During the regular session of the Forty Second Legislature, I was a member of the Committee on Highway and Motor Traffic and a member of the Free Conference Committee which passed upon House Bills 335 and 336, and, as such, heard and weighed all of the testimony, arguments and views expressed before the Legislature concerning the bills, and my actions and opinions as hereinafter expressed were partly based upon these considerations. As County Judge and as Representative in the Legislature, I have had forcibly called to my attention

the problems in this State arising out of the construction of our highways and the use thereof.

In my own county, we are now projecting a road program which, when completed, will give us ninety miles of state highway, constructed of concrete, and we have additional mileage of improved highways approximating one hundred and fifty miles. In considering the financial investment necessary to complete this program of construction in Brown County, we were compelled to take into account the prospective use of the highways the value thereof to the public and the safety of the public in such use. Observation had taught those of use who were dealing with this problem that [fol. 279] commercial transportation in this State was rapidly increasing. It has been my personal observation that heavily loaded trucks rapidly deteriorate the highways, and even in cases where the construction is of concrete the extreme weight of loads will break them down, first causing the underlying foundation to sag and produce waves in the road. My section of the State is largely agricultural and the road building program rests quite heavily on the farmer. Of necessity we are compelled to take the farming community largely into account in undertaking such expenditures and we must think of their right to use the highways and of their welfare and safety in such use. We are now materially affected by the passage of heavy commercial vehicles and by long trains, almost of motor vehicles on these highways, and it is quite apparent that regulation has become necessary. We have three major highways passing through Brownwood, the County Seat of Brown County. They are United States Highway 67 from St. Louis to Dallas and from Dallas through Brownwood to San Angelo and Presidio, at which point it will connect with a national highway from Presidio to California; United States Highway from Oklahoma through Fort Worth to Brownwood, ultimate destination Del Rio; and United States Canada-Gulf Highway from Saskatchewan, Canada, to the Gulf of Mexico, which has already been designated to Brownwood, Texas, and ultimately to be designated to Corpus Christi. These highways have not, of course, been completed with improvements throughout the entire routes thereof, but such improvements are in course of construction or in prospect at early dates. As a result, we have a heavy volume of this commercial transportation through our County.

As a member of the Legislature of Texas, I consistently advocated the placing of all commercial vehicles under the regulation of the Texas Railroad Commission. I mean by commercial vehicles those which are defined in House Bill 335 as motor carriers. I had in mind in advocating these measures to promote on the highways for the benefit of the general public efficient and economical transportation in the detail of transportation and at the same time incidentally so regulating the handling of such transportation as to enable the Commission to promote safety as well. This mat- [fol. 280] ter of safety in some quarters is considered to be of dubious import in connection with House Bill 335, but the mere placing of all motor carriers, as defined in that Bill, under the jurisdiction of the Commission, with authority in it to make regulations as to licensing all drivers, hours of operation, termini and minimum rates to be charged, will tend to promote safety as well as public welfare otherwise. The primary value of Bill 335, however, is that it promotes an economic and efficient system of transportation on the highway. It is impossible and the Legislature so perceived in passing this legislation, to promote and conserve efficient use of the highways unless we are permitted to regulate, in the manner set forth in House Bill 335, the contract carriers as well as others. The chief difficulty lies in that the so-called contract carriers take to the road in large volume, underbidding all of the common carriers, procuring thereby the cream of the business, operate when they please and where they please, and it is impossible to keep any efficient check of them or regulation over them in absence of authority on the part of the Commission to regulate them as provided in the Bill.

House Bill 336 meets the necessity for preserving the highways, lessening the expense of maintenance, lessening the hazard of operation thereon and increasing the convenience in the use of the highways to the general public. From my own observation, I am convinced that the restrictions as to height, width, length and weight and speed are essential in order that these purposes be accomplished. The limitations set forth in House Bill 336 are not considered extreme in the light of my own observation; in fact, I advocated even more stringent limitations than those permitted by that bill. My view point is illustrated by some of my own experiences. In January 1931, I had occasion to go from Austin to Hous-

ton and the entire length of the highway, until I reached Harris County, had a surfaced width of sixteen feet. This was the dullest period of the truck season and particularly the cotton season and on my way from Austin to Houston I followed nine trucks a total distance of thirty six miles and was unable to pass the trucks until I reached some village. Most of these trucks were loaded with cotton. On my way back from Houston to Austin I met thirty seven trucks, most of them cotton trucks and on account of the recent rains I was forced every time I met a truck to drive off the surfaced portion of the highway and come to a stop to permit the truck to pass. I estimate that this delayed me a total [fol. 281] of some three hours in going to and coming from Houston.

I feel that I should give this further viewpoint in conection with the legislation under discussion. The Legislature is compelled, of course to adjust its regulations to the highway system of the State as a whole. It is a task at best so difficult that the Legislature cannot undertake classifying the roads and permitting varying heights, widths, weights and lengths, and it is not thought that this will be a wise policy in any event. Adjusting, therefore, the legislation to the average roads, the restrictions adopted were practically the maximum that could conveniently and safely be adopted. As reflecting the public sentiment in my territory on this subject, and to conclusively show that these bills were not the product of the activities of any special interest, I wish to state that every Chamber of Commerce in the communities of the district I represent and in the adjacent districts unanimously endorsed the restrictions and regulations found in these laws. I want to state that I spent two Saturdays in my two counties, making inquiries from citizens and farmers and various and sundry persons, and except for the truck men themselves, I found practically a unanimous sentiment in favor of the truck regulations as proposed by the Legislature and as finally passed by the Forty-second Legislature.

I found that my colleagues in the Legislature were similarly affected, not only by the merits of the questions involved, but by the sentiment found in their communities. I wish to add in conclusion that the sentiment still is as stated and my people are crying for the enforcement of these laws.

Affidavit of W. R. Ely

I am Chairman of the Highway Commission of Texas, having served as a member of said Commission since 1927, and having been Chairman of the Commission since January of the present year. Since the creation of the Highway Commission of Texas, the state highways have been constructed under its supervision, and as a member of the Commission it has been my duty to and I have, familiarized myself with the conditions of the highways throughout the [fol. 282] State. I know the character of their construction, and in a general way, the cost of such construction and the cost of the maintenance thereof, and the amount of traffic thereover.

I know that the greater number of improved highways in the State today were intended for a lighter traffic than that for which they are being used. That the damage being done to these highways results largely from the use of oversized and overloaded commercial trucks.

Recognizing the increased cost to the State in the construction and maintenance of these roads on account of this use, the Commission, at the request of the Senate, made definite recommendations to the 42nd Legislature as to the character of legislation that should be enacted to properly regulate the use of these highways by this character of traffic. I attach hereto and make a part of this affidavit a copy of such recommendations and have marked the same Exhibit "A" for identification.

Unless and until legislation is made effective regulating commercial trucks in the length, height, width and weight of their load, the maintenance of these highways will be excessive and their use by the public will be dangerous.

I am familiar, in a general way, with the difficulties incident to the enforcement of the regulations governing the use of the highways by these commercial vehicles and I know that these regulations cannot be enforced unless authority is vested in some agency of the Government to require a strict method of reporting and accounting for the number of trucks and the extent of their operations on these highways. Trucks of excessive length or width or of height, are a constant menace to the safety of the lives of the public in its use of the highways and these oversized and over-loaded trucks are the cause of the larger part of

the wear and tear to these highways and greatly increase the maintenance cost.

I am familiar with the recent laws enacted by the 42nd Legislature contained in what is known as House Bills Nos. 335 and 336. It was the opinion of the Commission, of which I was chairman, that if the regulations contained in these bills were made effective, that the large part of the [fol. 283] hazards incident to the use of the highways would be elimi-ated and the cost of construction and maintenance of the highways would be reduced.

The State of Texas, State Highway Department, Austin

February 4, 1931.

To the Senate of Texas.

GENTLEMEN: We have copy of Senate Resolution No. 10 adopted January 19, 1931, requesting us to submit information and data within our possession touching the operation of trucks and bus lines over the State highways and relating to injury to the highways and danger to persons and property, together with our recommendations as to such measures as we deem necessary.

1. As to the Maximum Weight of Vehicles and Loads.—It is respectfully submitted that very great damage has been done to the highways of Texas in the past few months which may be attributed to too much weight and too much load now allowed vehicles under the law of this State. The Department has in its possession certain data as to the effect of overloading on highways which is available to the Legislature and which you may secure from Mr. Gibb Gilchrist, State Highway Engineer.

There are many highways in Texas that should not carry more than a maximum weight of 5,000 lbs, while other highways could easily carry 20,000 lbs. If trucking privileges should be granted to only Class "A" trucks and Class "B" trucks and unclassified trucks operating under contract abolished, then it should be easy to protect the highways not able to carry unusual loads, as the Railroad Commission, in granting Class "A" permits, should take into consideration the character of highways to be traversed by such trucks. In this connection we desire to state that the law should be so amended that the Railroad Commission

should be required to secure the permission of the Highway Department before granting permits for certain classes of trucks to operate on certain roads.

Several States have laws giving their highway departments power and authority to classify highways under their jurisdiction as to the amount of tonnage that shall be permitted on such highways and we are of the opinion that a [fol. 284] law of this kind in our State would have a tendency, in a measure, to solve the problem of too much weight on the highways.

Under Article 834 of the Penal Code authority is given to the Commissioners' Courts or the State Highway Commission to regulate the tonnage of trucks and heavy vehicles, which, by reason of the construction of the vehicle or its weight and tonnage, shall tend to rapidly deteriorate or destroy the roads, bridges and culverts along the particular road or highway sought to be protected and require that notice shall be posted and state the maximum load permitted, etc., but the Article further gives the operator of any such vehicle the right to complain in writing to the County Judge of such county, and makes such County Judge the final arbiter as to whether or not such vehicle might be operated on the road in question. Our opinion is that that statute should be amended so that the Highway Department will have sole jurisdiction in the matter of whether or not certain vehicles should be used on particular roads.

Our conclusion is that the depreciation of the highways is due to heavy loads hauled over them and not to the large number of private automobiles and light trucks that are being used and that the only way that their destruction can be stopped is to reduce the weight of the loads.

2. The Height, Weight, and Other Dimensions of Vehicles and Loads.—Relative to this inquiry it is respectfully recommended that, in our opinion the height of vehicle and load should not exceed twelve (12) feet. During the past ten years there have been quite a number of underpasses constructed on the State highways of Texas. There are probably one hundred underpasses in the State of Texas, which have a vertical clearance of less than 14 ft. Some of them have a vertical clearance of less than 10 ft. Between Fort Worth and Vernon there are three locations where the underpasses have clearances less than 12 ft. One of them is at Bowie, under the F. W. & D. C. R. C., for which the

clearance is 10 ft. Two are at Wichita Falls which have a clearance of 9 ft. 9 inches under the F. W. & D. C. R. R. and under the F. W. & D. C. Railroad at Oklaunion near Vernon the clearance is 10 ft. 11 inches. There are two hundred or [fol. 285] more bridges on the State Highway System which have been built in the last twelve years which are of the through truss type in which the portals have clearance at the center of 14 feet and at the sides of only 11½ ft., making a total of three hundred structures on the State Highway System which have a vertical clearance less than 12 ft. for the entire width of roadway.

However, for the steel spans which have portals with side brace the part of restricted clearance on the side is for a very short distance and as a usual rule there is a width of 10 ft. in the middle of the structure which has a full clearance of 14 feet, but this brings about an unuqually dangerous condition when a large moving van is crossing a bridge and is met by another car. The moving van has to move over to one side to let the other car get by and as a usual rule the driver of the moving van forgets about the side brace and portal of the span and as a result collides with the same which results in damage.

The American Association of State Highway officials an association composed of both State and Federal officials, whose committees constitute the medium of expression of the Federal Bureau of Public Roads on the regulation of commercial vehicles, and the composite opinion of the various State Commissions, have given this subject considerable attention. This Association has recommended that the maximum gross height of load should not exceed twelve (12) feet. The National Conference on Street and Highway Safety has likewise recommended a maximum gross height of load of twelve (12) feet.

Relative ro the width of vehicles we quote from our Biennial Report which is not yet off the press:

"We want to renew our recommendation of two years ago and again urge that more restrictions be placed on the size and weight of vehicles using the State highways and that more enforcement facilities and personnel be provided. We believe that the authorized maximum width of any vehicle should be between 84 and 90 inches, preferably

the former, but certainly no greater than 90 inches, and that the height be restricted to twelve (12) feet."

Safety cannot be maintained without ample clearance. Vehicles of greater width than 84 to 90 inches are not safe [fol. 286] on an 18 ft. highway. Glaring lights are one of the big hazards which the motorist has to face. In the absence of a clear center-line marker, one is subjected to danger every time he meets a big car on the highway at night. This danger is greatly augmented when the pavement is wet. The tendency is to turn out to make the clearance sure and a new hazard threatens in the liability of the right hand wheels running off the pavement into the soft mud. Our judgment is that 84 inches would be much safer than 90 inches.

With respect to length of the vehicle, we recommend the maximum length of any combination of vehicles coupled together should not exceed 45 feet and the maximum length of any single vehicle should not exceed 30 feet.

3. The Speed for the Operation of Such Vehicles.—We recommend that a maximum speed for a motorbus be limited to thirty-five (35) miles per hour and for trucks from twenty (20) to thirty (30) miles per hour, depending upon their weight. We believe that the present law regulating speed of commercial vehicles is too lenient. The law is worded in such a way that it applies only to the gross weight of a motor vehicle with trailer attached. In other words a truck now may lawfully be operated on the Highways where the truck is of a gross weight of 10,000 lbs., and a trailer of a gross weight of 10,000 lbs., at a rate of speed of thirty five miles per hour, which, in our opinion, is entirely too fast for a gross weight of 20,000 lbs.

We further respectfully recommend that the penalty for the violation of laws regulating the size, weight, height and speed of commercial vehicles be increased.

4. Such other recommendations regarding this matter as said Commission may desire to submit.

We recommend that within a reasonable time that the use of solid or steel tires on motor vehicles weighing more than 2000 lbs. be prohibited.

There are many other matters respecting the operation of motor vehicles upon the highways that we might mention but the information and experience of the officials in the Highway Department will be available at any time required.

Respectfully submitted.

(Signed) W. R. Ely, D. K. Martin, Members of the Commission.

[fol. 287] AFFIDAVIT OF DAN MOODY

I held the office of Attorney General of Texas from January, 1925, until January, 1927, and thereafter the office of Governor of Texas from January, 1927, until January, 1931. During my tenure in the office of Governor, it became my duty to appoint, and I did appoint a State highway Commission charged by law with certain duties pertaining to the building and maintenance of highways in this State. At various times and on different occasions between January, 1927, and January, 1931, I conferred with various members of the Highway Commission of Texas and employes of the Highway Department of Texas, touching on the subjects of the building and development of a system of highways in this State; the maintenance of highways; the cost of building and maintaining highways and the means and methods of raising funds necessary for the construction and maintenance of highways. From conferences with engineers employed by the Highway Department and from observation in traveling over the highways of Texas and from items appearing from time to time in the newspapers, I formed certain conclusions regarding the use of the highways by large commercial motor vehicles and the effect of such traffic upon the highways and the results of this traffic to the general traveling public using the highways.

I felt it my official duty as Governor of Texas to direct the attention of the Legislature to the subject of Highway Construction and Highway maintenance and the methods of financing this part of the public business. I further felt it my official duty to present to the Legislature the subject of the regulation of commercial motor vehicles engaged in the use of the public highways.

An expression of my views on these subjects was embodied in my message to the Forty Second Legislature and such recommendations as I cared to make to the Legislature on these subjects were made in this message. I have had copied from the House Journal January 15, 1931, Page 21 of the 42nd Legislature a part of my message on the subject of Highways as it appears therein and I have attached such copy hereto and mark it Exhibit "A" for identification.

I have had copied from the House Journal January 15, 1931, Page 25, 42nd Legislature, a part of my message as [fol. 288] it appears thereon, on the subject of Motor Vehicles, and I attach such copy hereto and mark it Exhibit "B" for identification.

My views, as expressed in this message were formed upon such information as I had been able to gather from the sources available to me, on the subjects discussed and from my personal observations.

EXHIBIT A TO AFFIDAVIT OF DAN MOODY

Highways

Much has been done in the last four years toward taking Texas out of the mud and placing it on a finished highway, but there are thousands of miles of State highways yet to be built. The financing of State highway construction was a problem when the department was established and it remains a problem. In the early stages of State highway construction, it was necessary to adopt the policy of calling upon local communities to assist in meeting the cost of highway construction, but the continuation of this policy has appeared unwise for some years. It has resulted in the issuance of many millions of dollars of road bonds and the placing of an excessive tax upon the homes, farms and ranches to pay interest and redeem bonds. It has made the building of State highways depend upon local initiative and has precluded the possibility of formulating and carrying out a State wide program of highway construction. It is in a large measure responsible for the fact that the good highways of the State are broken here

and there by stretches of bad road through counties and districts that have refused to contribute to the cost of road improvement. A change was made in the laws some years ago to make possible the completion of a connected system of highways by improving the bad stretches at the expense of the State Highway fund, but the amount of the State highway fund has limited the practical benefits derived from this amendment. The most serious consequence of the policy is the fact that land and homes are taxed beyond their ability to pay, while traffic which uses the highways and receives the first benefit from the construction moves at a comparatively low cost, the relative benefits to agricultural lands and traffic being considered. It is no exaggeration to state that in some counties and districts the road bond tax is positively oppressive on owners of [fol. 289] farm lands and small homes. The State should without delay make provision to assume payment of all outstanding bonds, proceeds of which have been used to pay the cost of State highway construction. The justice of such a policy can be thoroughly defended because State highways are intended for through traffic, including interstate traffic, and are not purely local convenience.

If the benefited properties pay the cost of building and maintaining lateral and local roads, these properties will contribute their part to highway construction. It is to be remembered that while the designated highway mileage totals about 20,000 miles there is more than ten times this mileage of local and lateral roads. The burden of improving State highways should be taken off the backs of farmers and small home owners, and the traffic which receives the first and greatest benefit from highway improvements should be taxed to meet the cost of constructing the system of State and Federal designated highways.

When the total of all funds available for State highway building is reduced by the amount of the county and road district contributions other revenue will be necessary, if the present enlarged program of highway construction is to continue. There are but two ways such revenue can be raised to maintain the present income of the highways fund after county and district aid is discontinued—first: by higher rates of current taxation, or second: by issuing State bonds and pledging revenues of the highway fund to redeem the bonds. The normal increase in highway

revenues from present rates of taxation will not for the present amount to as much annually as is contributed by counties and road districts. The best public policy is for the State to assume the payment of county and road district bond issues used to help pay the cost of State highways and relieve the counties and road districts of further contributions to the cost of State highway construction and continue the present program of highway building with funds derived from the issuance of State bonds to be paid by pledging part of the revenues received by the highway fund from current taxation. This would be a combination of the bond plan and the pay-as-you-go plan of construction- State and Federal designated highways. The objective should be to give the Highway Department a stabilized income in order that it may plan a program of construction over a period of years instead of having to limit its work to a month to month program.

[fol. 290] EXHIBIT B TO AFFIDAVIT OF DAN MOODY

Motor Vehicles

The increased use of motor vehicles in commercial transportation has developed a difficult and perplexing public problem, Our roads are being taken and badly used by motor vehicles engaged in the transportation of passengers and freight for hire. Some of these vehicles are so large and travel at such high speed that they make highway travel extremely hazardous. When the saving this business brings the public in the cost of its transportation is compared with the damage which heavy freight and passenger traffic are doing the highways, it is doubtful whether the motor truck and motor bus business is being operated economically from the standpoint of the public. Laws should be enacted placing further limitations upon the size and weight of the busses and trucks that may be legally operated upon the public highways of this State. The most modern and improved safety devices, appliances and practices should be required by law. In enacting a law placing further limitations upon the size, weight and speed of trucks and busses, a reasonable time should be allowed to

dispose of trucks and busses, the use of which would be prohibited by such limitations. This can be accomplished by fixing the date that such bill would become effective. If busses and trucks are operated over routes parallel to existing lines of railway and in competition with them, it seems evident that under the policy of the Federal Government, as declared in Transportation Act of 1920, that the people will ultimately be called upon to pay higher rates on commodities which must move by rail, and that the same may exceed the public's saving accomplished by cheaper bus and truck rates. Motor Vehicles are here to stay as a means of commercial transportation and should stay, but thought should be given to placing motor vehicle transportation in the field which will be of the greatest economic value to the whole people. If trucks and busses are to operate in competition with railroads and at considerable damage to highway development, and if because of the reduced business of the railroads, the public is made to pay higher railroad rates on commodities moving by rail, it is hardly possible that under such conditions the truck and bus transportation could be economically profitable to the general public. It [fol. 291] is altogether possible that the field of economic usefulness of truck and bus transportation is under ownership independent of railroads and operating as feeder to existing lines of railway and to supplement the service rendered by railroads in local freight and passenger movements.

The Railroad Commission should be given authority to check returns and determine accurately the gross and net income of commercial motor vehicles with the view of determining whether such business should pay a gross receipts tax to help the highways.

AFFIDAVIT OF C. V. TERRELL

I am the present Chairman of the Railroad Commission of the State of Texas and have served as a member of the Railroad Commission since August 15th, 1924.

Under the laws of Texas, the Railroad Commission is charged with the regulation of motor carriers on the public

highways of the state and the enforcement of the laws pertaining to such motor carriers. Under the old law, being Chapter 314 of the Acts of the 41st Legislature, Regular Session, as amended at the Second Called Session thereof, there was no adequate provision made for regulation of some of the classes of commercial vehicles. The Class A motor vehicles as defined under the former law were regulated. The lack of adequate regulation for B trucks and no regulation at all for contract trucks, demoralized the truck transportation on the highways of the state and seriously affected the operation of common carrier motor trucks thereon. The law was so framed that it only affected those trucks that originated freight in an incorporated town, city or village, and to be delivered to an incorporated town, city or village, that only gave us jurisdiction of about 1500 trucks in the state compared with 206,000 that were licensed by the Highway Department, which was so small a per cent that it hardly amounted to any regulation at all. During recent years there has been a very marked increase of motor carrier operation in the state, and in the last two years this character of transportation has been phenomenal. The number of unregulated operators, mainly contract carriers, under the present law has increased approximately three or four hundred per cent since 1928.

As a member of the Railroad Commission and as Chairman of that Commission, I have given careful thought to the regulation of motor carriers on the public highways. I am firmly of the opinion that the public interest as to [fol. 292] safety on and protection of highways and as to the provision of economical, efficient and orderly transportation thereon, requires that all character of vehicles using the highways for hire be regulated to as great a degree as possible.

There now exists a chaotic condition on the highways of the State to the great detriment of the public interest. I am of the opinion that it is necessary in order to have an orderly, economical and efficient regulation of commercial transportation on the highways, that the contract carrier as defined by the present law, as well as the common carrier, be regulated and that one of the essential requirements in the regulation of a contract carrier is the ability

of the Railroad Commission to fix the minimum rates charged by such carrier.

As Chairman of the Railroad Commission of Texas, I am in position to state and I do state, that it is the purpose of the regulatory laws mentioned to foster within reasonable bounds commercial transportation on the highways of Texas, and that this purpose involves the further purpose of primarily fostering and serving the business of common carriers on the highways. In this connection, the experience the Commission has had in endeavoring to regulate highway transportation demonstrates that unregulated contract carriers as defined by the present law, effectually prevent the primary purpose of fostering and conserving for the general public welfare that commercial transportation on the highways which it has been the purpose of the laws of Texas and the rules of this Commission to foster and protect. The common carriers, who have seen fit to take out certificates of convenience and necessity under the laws of Texas heretofore have found the cream of business taken by Class B motor carriers as defined by the former law and contract carriers, as defined by the present law, who solicit and take that business which is convenient for them to handle and who underbid the common carriers for such business, thus thwarting the purpose of the regulatory laws mentioned.

Wherefore, I am constrained to say that the business of these contract carriers, as defined by the present law, should be regulated in order to bring about an orderly transportation system in Texas. It has been the policy of [fol. 293] this Commission to avoid the very appearance of any act which would influence legislation concerning any of the subjects of regulation by the Railroad Commission, and has been, and now is the policy of this Commission to attempt in every reasonable way to enforce and administer the laws as written by the Legislature. We do not at any time question the wisdom of the Legislature in any legislation enacted by it.

If only the Class A motor carriers under the former law are regulated under the present law, and the Class B motor carriers under the former law, and the contract motor carriers, as defined by the present law, are not regulated as to their rates, the Class A motor carriers under the former

law and all other common carriers, as defined under the present law, will be so seriously affected by unfair competition that a chaotic state will exist to the great detriment of the public. The control of contract carrier service is so inextricably related to common carrier service, that it is necessary to fix its rates and regulate its service in order to have an orderly and systematic transportation service which will not result in discrimination for or against any community or individual.

Affidavit of Mark Marshall

My official position is that of Director of the Motor Transportation Division of the Railroad Commission of Texas. I have held this position since the Division was first organized in June 1927. This Division is charged with the duty of administering and enforcing the laws of Texas affecting the transportation of persons and property over the highways of this State. In the performance of my duties, I have had occasion to familiarize myself with the conditions of highway transportation, and have had occasion to investigate personally and officially the many problems of proper regulation of motor vehicle transportation.

The experience of this Division has demonstrated the necessity for proper regulation of motor vehicles transporting passengers and property for hire over the highways of this State. This is true of all classes of motor vehicles using the highways for the purpose of gain. Such [fol. 294] regulation is necessary for several different reasons. In the first place, the proper regulation and licensing of persons driving motor vehicles for hire results in greater safety and convenience to the traveling public. The Commission has adopted certain requirements before a man is licensed to drive a motor bus in this State. We require that he furnish satisfactory evidence that he is sober, responsible, capable and physically sound, before he is issued a license. This requirement has very materially raised the efficiency and responsibility of the personnel of motor bus operators in this State. It has reduced accidents, injuries and deaths on the highways of this State.

As an illustration of the effect of proper regulation and licensing of operators, the record of passenger motor busses is enlightening. Since June 1927, when regulation of passenger carrying vehicles was inaugurated, motor busses have carried approximately 4,750,000 people per year over the highways. During this time only four passengers have been killed as a result of such operation. Three of those were killed in an explosion of a moving picture film which was being carried on the bus and the other was killed as a result of being side-swiped by an unregulated motor truck. Prior to the time that regulation was enforced, numerous accidents and deaths were reported in all sections of the State. It is my opinion that proper regulation of the drivers contributed very materially toward the reduction in injuries and deaths which has been shown. At the time of the explosion of motion picture film above referred to the Commission had in effect an order prohibiting the transportation of explosives by motor bus companies.

This division has had the same experience since the regulation of motor trucks has been in force. From the records on file in my office and from my own personal experiences and observations, it is my opinion that the operators of motor trucks carrying property, who are under the regulations of this Division have fewer accidents and cause fewer injuries on the highways of this State than the operators of motor trucks who are not subject to the supervision of the Commission. Since the regulation of motor trucks became effective in August 1929, there has been a [fol. 295] considerable decrease in the number of companies operating under the supervision of the Railroad Commission. For example on December 31, 1929, there were 462 Class A operating certificates in force, and in August, 1931, when the old law became inoperative, there were only 364 operating companies of this class. There were issued in the fall season of 1930, 187 temporary emergency commodity certificates restricted to the hauling of cotton. On August 21, 1931, only 76 of these companies were still operating. It is my opinion that the decrease in the number of operating companies of these two classes brought about an increase in Class B operators, for the reason that on December 31, 1929, there were only 2,190 Class B trucks in

operation, while on August 21, 1931 there were 3,168 Class B trucks. It is my opinion that the Class A operators and special commodity operators discontinued operations as such and went into Class B hauling, because rates and routes were not prescribed for Class B operators. The decrease in special commodity certificates restricted to the hauling of cotton from 187 to 76 was due to the fact that when rates were prescribed by the Commission, a great many of this class surrendered their certificates and went into contract hauling, where rates were not prescribed.

The use of the highways for hire cannot be successfully supervised and regulated unless the Commission is empowered to fix minimum rates. One of the results of the enforcement of the former law was to materially reduce the number of common carrier trucks and greatly increase the number of private or contract carriers. This tendency was so marked during the past year or so, that had the law remained in force, it is my opinion that the common carrier truck or Class A truck operator would have been forced to surrender his Class A certificate and engage in private and contract carriage only. The contract or private carrier was not required to charge the rates fixed by the Commission for common carriers. The result was that there was a constant decrease in the rates charged by the private or contract carriers. This resulted in a material decrease in Class A revenue, more inefficient service on their part, and a general lowering of Class A standards. Ultimately practically all of the property hauled over the highways of [fol. 296] this State would have been carried by unregulated and unsupervised trucks. This would have brought about the same condition which existed prior to 1929, when regulation was first undertaken by the Commission. Our experience has shown that without proper regulation, the number of trucks hauling commodities would have greatly increased, adding to the congestion of the highways and endangering the safety of the traveling public to that extent. As I stated the only way this condition can be corrected is in the manner provided by House Bill 335, which is now in force. If the Commission is empowered to fix a minimum rate for contract carriers, the confusion and chaos which existed prior to its effective date can be eliminated. The character of drivers will be raised, the

number of trucks operating on the highways will be reduced, the traveling public and the property hauled on trucks will be indemnified against injury to the person and against loss or damage of cargo.

It is my opinion that the rates charged by many contract carriers is below the cost of operation.

Affidavit of E. E. Latham

I have been engaged in the traffic and transportation business in Texas for about fifteen years. During that time, I have had experience in the handling of freight of various character by the Morgan Steamship Lines, Mallory Steamship Lines, Southern Steamship Lines and the Newtex Steamship Lines. I have also had experience during that period in handling freight through the different forwarding companies, and particularly have I had experience in having freight controlled by me handled by the Southwestern Freight Company Inc.,

The Southwestern Freight Company Inc., does the character of business that is usually done by freight forwarding and consolidating companies. They hold themselves out to the general public to accept freight of any kind and character in small lots and to consolidate it into large lots and procure the transportation of the larger lots of freight as the agent of the shipper and owner of the commodities. The Southwestern Freight Company Inc. will handle [fol. 297] freight of this character for the general public and they do handle it for the general public. They accept any and all freight on the terms of their t-riff, which they issue to the public and procure the transportation of the commodities tendered them, as the agent of the shipper and owner of the commodities, for the account of the general shipping public. The freight handled by the Southwestern Freight Company Inc., and all forwarding companies of that nature, is of several general characters towit: (1) it is freight that originates locally in the town or city where the forwarding company is operating and (2) it is freight which is shipped into that town or city in care of the forwarding company, for the account of the general shipping public.

All freight of any kind and character is received by the forwarding company, delivery is accepted and physical possession thereof taken by the forwarding company, who afterwards assorts the freight out for its different customers and for the different destinations, consolidate it into large lots and forward it in their name as consignor to their different customers as consignee. The billing of the freight is from the origin where it is consolidated under a bill of lading to the destination to which the forwarding company procures transportation as the agent of the shipper and owner of the commodities for the account of the general shipping public.

The Southwestern Freight Company, Inc., publish a tariff specifying the charges which they will make to the general public for the transportation of freight. The Southwestern Freight Company Inc., after receiving the freight from the general public, undertake to secure its transportation as the agent of the shipper and owner of the commodities, at rates less than the rates charged its customers, and the difference between the rates charged its customers and the rate at which the freight is actually transported represents the income and profit of the Southwestern Freight Company Inc. In the securing of transportation for its customers, the Southwestern Freight Company contracts with motor carriers to transport the freight over the highways, as well as contracting with railroads to transport the freight tendered them over the rail lines of this state.

[fol. 298] AFFIDAVIT OF S. G. REED, FREIGHT TRAFFIC MANAGER OF THE TEXAS AND NEW ORLEANS RAILROAD COMPANY

The table below shows movements of cotton to Houston, Galveston and Texas City by truck during the seasons 1928-1929, 1929-1930 and 1930-1931.

The increase in the movement shown thereby clearly indicates to my mind that in the event the legislation, recently enacted, shall not be effective, within a short time the public highways of the State of Texas, leading to Houston, Galveston, Texas City and Corpus Christi will be almost com-

pletely monopolized by trucks hauling cotton during the months August to October, inclusive.

The table follows:

Statement Showing Certain Information as to Movement of Cotton to Texas Gulf Ports

Cotton Production in Texas and Oklahoma

Season	Running Bales Produced in Texas	Oklahoma
1928–1929	4,941,545	1,187,042
1929–30	3,803,211	1,125,614
1930–31	3,886,141	856,967

Total Movement by Trucks to Houston, Galveston, Texas City, and Corpus Christi, Texas

Season	To Houston	To Galveston and Texas City	To Corpus Christi	Total
1928–29	220,486	2,754	191,565	414,805
1929–30	226,477	10,021	292,674	529,172
1930–31	692,449	152,406	329,988	1,180,843

Percentage Relationship of Movement by Years

1929–30 of 1928–29	102.7%	371.2%	152.8%	127.6%
1930–31 of 1928–29	314.1%	5751.9%	172.3%	284.7%
1930–31 of 1929–30	305.7%	1549.8%	112.7%	223.1%

Number Truck Loads at Twenty Bales per Load Required to Handle the Actual Movement by Trucks for the Entire Seasons Shown

1928–29	11,024	138	9,578	20,740
1929–30	11,324	501	14,634	26,459
1930–31	34,623	7,920	16,500	59,043

[fol. 299] Total Movement by Trucks during August, September and October of Each Season

1928–29	105,031	1,187	158,648	264,866
1929–20	143,344	4,799	250,193	398,336
1930–31	460,065	63,428	309,721	833,214

Truck Loads Required to Handle Movement by Trucks during August, September and October of Each Season at Twenty Bales per Load

1928–29	5,252	59	7,932	13,243
1929–30	7,167	240	12,510	19,917
1930–31	23,003	3,171	15,466	41,666

Truck Loads Required to Handle the Texas Crop at Twenty Bales per Load

Season	Crop in Bales	Truck Loads
1928–29	4,941,545	247,077
1929–30	3,803,211	190,161
1930–31	3,886,141	194,307

[fol. 300] AFFIDAVIT OF GEO. A. KNAPP

My name is Geo. A. Knapp. I reside in Houston, Texas. I am employed as Special Engineer for the Southern Pacific lines in Texas and Louisiana. I was graduated from the Baltimore Polytechnic Institute in 1889 and have practiced Civil Engineering continuously since that date. Approximately one-half of the period since graduation has been in engineering railroad work. The remainder of the time has been spent in general practice, covering drainage, highways, irrigations, structural design and contracting. About two and one half years of this time was spent as Lieutenant Colonel in command of the 315th Engineer Regiment 90th Division for the duration of the World War.

During a considerable period of time I have been assigned to gather certain statistics concerning motor carrier and motor vehicular operation over the highways of Texas, and concerning the highways of Texas. Pursuant to these investigations, I have ascertained from an inspection of tax records that the average size of all truck and commercial motor vehicles in Texas is approximately one ton, manufacturers rated capacity. As license taxes are now levied upon the gross weight of a truck, that is, the weight of the entire truck plus the weight of the rated capacity load, the gross or taxable weight of the average one ton truck is approximately 5,000 pounds. Likewise the average size of carrier trucks, those transporting goods for hire, has been ascertained to be 2½ tons rated capacity and as having a corresponding gross weight of approximately 11,000 pounds. The average weight of all privately operated motor passenger cars in Texas is found to be approximately 2,600 pounds, which when loaded with an average of three persons will have a gross weight of approximately 3,000 pounds. In addition to the foregoing data pertaining to the sizes and loads of the average classes of trucks in Texas, it is essential to know how many of the larger sized and heavier trucks there are as compared with the number of smaller types. Probably the best index of this question is furnished by the relative numbers of the various sizes of trucks manufactured. Taking an average for the four years 1926 to 1929 inclusive, it is found that 60% of all trucks produced were less than 1½ tons capacity; 89% were less than 2 tons capacity, 93% were less than 2½ tons capacity; and 97.3%

[fol. 301] were 3½ tons capacity and less. In order to apply these average figures to Texas trucks, it is necessary to consider the relative mileage of the improved and unimproved roads in Texas as compared with the United States, good roads being invariably a prerequisite to the use of the heavier types of trucks. The surfaced rural highways of Texas are 61% of the average for the United States, while the rigid type or concrete rural highways of Texas are 38% of the average for the United States. The assumption is therefore liberal that the relative number of the heavier trucks in Texas is equal to that of the average for the United States. Assuming then these percentages to be representative of the various sizes of trucks used in Texas, there were registered in Texas during 1930, out of a total of 206,528 trucks of all sizes the following:

Trucks with a rated capacity of less than 3,000 lbs.	123,917
" " " " " 4,000 lbs.	183,810
" " " " " 5,000 lbs.	192,071
" " " " 7,000 lbs. and less	200,951
" " " " more than 7,000 lbs.	5,577

The total number of passenger vehicles registered during the calendar year January 1, 1930 to December 31, 1930 was 1,158,415. The heaviest of these weighs but 6,300 pounds and with a full load of seven passengers at 150 pounds each, would weigh 7,350 pounds, thus coming well within the gross weight of 15,000 pounds of a 3½ ton truck.

Many misleading and irresponsible statements have been made as to the amount of taxes which are being paid by the trucks operating upon Texas highways and the relation of the amount of these taxes to the cost of the highways and their maintenance. An examination of the records for the total license fees and gasoline taxes which have been paid by all trucks and trailers registered in Texas since the time that special taxation of motor vehicles was begun in 1917 on down through the year 1930 shows the following:

(NOTE.—Registration fees below based on actual fees to State Highway funds, plus estimated to County Road and Bridge fund. Gasoline tax amounts are apportioned on estimated consumption for the respective classes of vehicles.)

1917–1930, inclusive	All motor vehicles	All trucks and trailers
Total license fees	$124,256,357	$19,376,461
Total gasoline tax	85,190,212	16,143,979
Total special taxes not including privilege tax	$209,446,569	$35,520,440

[fol. 302] It is thus seen that the total special taxes, gasoline and license, paid by all trucks and trailers for all years during which these taxes were levied, amounted to approximately 17% of the total paid by all motor vehicles during the same period, the passenger cars and other minor vehicles paying 83%. The bus-es paid about 2% which because of its comparative insignificance has been included in the 83% as shown.

All of the foregoing tax data pertains to taxes which are common to all motor vehicles. In the case of carrier trucks, both common and contract carriers, as also motor bus-es, there is an additional tax levied which may properly be called a "privilege tax" in that the purpose of its payment is to exact a fee for the use of the public highways upon which these vehicles conduct a private business, transporting as they do, either persons or property for hire.

This tax in the case of the common carrier or Class "A" trucks is $15.00 per vehicle per year and in the case of the contract carrier or Class "B" truck is $5.00 per vehicle per year. In the case of the buss the fee amounts to $1.00 per seat plus $10.00 per vehicle per year or an approximate total of $30.00 per average vehicle per year.

The cost of the State Highway System to date is approximately $250,000,000 and their maintenance has averaged during the past three years the sum of $12,000,000 per year. Considering the interest on the public's investment, say at 6% per year, plus the cost of maintenance, would show an annual carrying charge of $27,000,000 per year. To this must be added an unidentified sum for the permanent damage wrought to the highways which has been caused by the operation of the heavier carrier trucks which has been shown to be 2½ times that of the average truck. The most casual inspection of these data will show the inadequacy of these fees for the use of the highways as a public property upon which to conduct a private business. Moreover the claim so often heard that "the trucks are paying for the highways" is set at naught when it is realized that the total taxes of all trucks has paid but 14% of the present cost of the State highways allowing nothing for their maintenance.

In the drafting of laws designed to adequately protect the public's investment in the highway system as well as to

prevent any unwarranted expenditure of public money for highway maintenance, the consideration of primary importance is that concerned with the size and loading of the vehicles passing over the highway. I am familiar with the [fol. 303] provisions of Houston Bill 336 passed by the 42d Legislature at its regular session, and it is my opinion that, in view of the foregoing data, and especially those provisions limiting the load and speed of motor trucks, if properly enforced, will reduce the maintenance costs of our State highways, by at least $3,500,000.00 to $4,000,000.00 per year. This would represent a saving in maintenance alone of one-third of the annual expenditure for that purpose.

Affidavit of L. G. Phares

My name is L. G. Phares. I have been duly appointed by the State Highway Commission as Chief of the State Highway Patrol. I have worked in this capacity since the existence of the Highway Patrol which was January 8, 1929. Prior to this time I worked for the Highway Department in different capacities since 1925.

During the past two or three years the average truck has made it dangerous to use the highways of this state by reason of excessive speed, excessive loads and disregard for the rights of others, because of a lack of proper limiting of weight, height, width, length and speed. With proper regulations the same commodities may be hauled upon the highways with safety to the public and without damage to the highways.

The official records of this department have been furnished me by the Maintenance Engineer and the Auditor. These records deal with the gross truck traffic in Texas during the past few years, and the use and loading of motor vehicles. It is shown that truck density in Texas as measured by the percentage that trucks are of all vehicles compared with that of the United States has increased enormously and especially so during the recent years of 1924 to 1930 inclusive. From 1924 to 1930 inclusive the truck density of the United States has remained practically constant while that of Texas has mounted rapidly from 64% in 1924 to 100% of that of the

United States in 1928 and being 15% above that shown for the United States in 1930. This great increase in truck traffic on Texas highways indicates the imperative need for adequate truck regulation toward the end of preventing the destruction of the State and County highways as well [fol. 304] as insuring the safety of the traveling public in their use of it.

The gross weight of trucks in excess of 3½ tons increased rapidly as is shown in the following:

Average 4 ton truck has gross weight of 17,000 pounds.

Average 5 ton truck has gross weight of 21,000 pounds.

[fol. 305]

Texas State Highway Department

Comparison of Traffic Census Figures

County	Hy. #	Point	1929 Total Vehicles	1929 Total Trucks	1930 Total Vehicles	1930 Total Trucks	1931 Total Vehicles	1931 Total Trucks	% of inc. in 1930 over 1929 on Trucks	% of inc. in 1931 over 1930 on Trucks	% of inc. in 1931 over 1929 on Trucks
Jefferson	8	3 mi. S. E. City L. Beaumont	4463	441	4533	495	5551	1271	12%	157%	188%
Dallas	15	Dallas-Kaufman C. L.	1855	207	2153	231	4057	823	11½%	256%	297½%
Dallas	1	Dallas-Tarrant C. L.	6570	569	6567	623	7696	801	9½%	28½%	41%
Harris	19	3 mi. N. C. L. of Houston	2344	430	3214	501	4095	691	16½%	38%	60½%
Collin	6	Dallas-Collin C. L.	2178	220	2509	293	2687	620	33%	112%	182%
Harris	6	N. at Jct. Hy. 6 & LaPorte Road	2671	487	5812	362	8471	573	26%	58%	17½%
Nueces	16	Nueces-San Pat. C. L.	2497	301	4199	477	3997	524	58½%	10%	74%
Bexar	16	Salado Crk. Br.	1961	280	2602	372	2727	499	33%	34%	78%
Harris	6	S. at Jct. Hy. 6 & LaPorte Rd.	2671	487	5812	362	7043	495	26%	36½%	1½%
Potter	33	1 Mi. E. C. L. Amar.	1266	257	1704	261	2709	466	1½%	78%	81%
Wilson	16	2 Mi. S. E. of Calaveras	1961	280	2149	340	1981	425	21½%	25%	52%
Foard	28	4 Mi. E. of Crowell	465	67	611	66	981	421	1½%	538%	528%
Parker	1	4 Mi. W. of Weatherford	2119	265	2334	290	2496	411	9½%	41½%	55%
Angelina	35	3 Mi. S. C. L. Lufkin	1361	156	1436	146	1464	317	6½%	117%	103%
Bee	16	4 Mi. C. Beeville	1559	190	2618	292	2205	358	53½%	22½%	88½%
Bexar	2	Bexar-Guad. Co. L.	2012	302	3055	366	3251	368	21%	½%	22%
Carson	33	Carson-Potter, C. L.	1266	257	1700	261	1687	304	1½%	16½%	18%
Comal	2	5 Mi. S. W. New Braunfels	2695	231	2772	315	2999	331	36½%	5%	43%
McLennan	2	5 Mi. S. of West	2997	186	2747	207	2884	358	11%	73%	92½%
Nacog	26	N. at Jct. Hy. 26 & 110	777	242	716	80	1110	296	67%	270%	22%
Nacog	26	S. at Jct. Hy. 26 & 110	777	242	716	80	1325	355	67%	343½%	46½%
P. Pinto	1	P. Pinto-Parker C. L.	2119	265	2334	290	2556	305	9½%	5%	15%
Randall	33	7 Mi. N. of Canyon	1570	320	2749	345	2569	392	8%	13½%	22½%
T. Green	9	N. at Jct. 9 & 30	1262	119	1210	134	2145	337	12½%	151½%	183%
V. Zandt	64	N. W. at Jct. 19 & 64 near Canton	1666	206	1560	156	2094	350	24%	124½%	70%

J. B. EARLY, Maintenance Engineer.

I hereby certify that the above is a true and correct copy of official records on file in this office.
Subscribed and sworn to before me this 29th day of August 1931. Arnold Bradley, Notary Public, Travis County.
Zay Johnson, Ass't Maintenance Engineer.

[fol. 306] LAWRENCE WESTBROOK, Waco, Texas, stated:

I have had experience as a cotton merchant, as a cotton producer, and as the owner of cotton gins. Practically my whole business life has been engaged in different phases of the cotton business, and especially for the past 10 years I have studied the problems of cotton marketing from the producer's standpoint. I formerly organized and operated a cotton cooperative association, and the past year I organized for the State of Texas the Texas Cotton Cooperative Association.

The destruction of the interior cotton market is an economic catastrophe for the producer, as well as for the general business structure in the interior. Any saving resulting to the producer from transportation charges by the trucking of cotton by motor truck has not, in my opinion, compensated the producer for his loss resulting from the disruption of his customary competitive local interior markets, which disruption and destruction of such local interior markets has been largely contributed to by the heretofore ineffectual regulation of the transportation of cotton by motor truck.

[fol. 307] Registrations from 1917 to 1923, inclusive, were not separated according to class of vehicle. The totals for each year are as follows:

Year	Registrations
1917	194,720
1918	250,201
1919	331,721
1920	430,377
1921	470,575
1922	531,608
1923	695,822

[fol. 308] AFFIDAVIT OF H. B. LOCKETT—Filed March 19, 1932

STATE OF TEXAS,
County of Dallas:

Before me, the undersigned authority, this day personally appeared H. B. Lockett who after being first duly sworn on his oath deposed and said:

I am Traffic Manager of John Deere Plow Company and it is a part of my duties to arrange for the transportations of the commodities handled by John Deere Plow Company and to generally arrange for the distribution of their products. That in arranging for such transportation and such distribution I contract for transportation service by railroad, by common carrier motor truck and by contract carrier motor truck. I am generally familiar with the practices of both forms of transportation.

The business of distributing agricultural implements such as that of John Deere Plow Company is a business in which transportation charges are an essential factor and a material element in the prices paid by the consumer for the commodity. It is necessary to know in advance prior to the making of a sale approximately what the transportation charges will be in order to conduct a business of this character at a profit, and in order to meet the competition of other people engaged in the same line of business.

In the past unregulated contract motor truck carriers have maintained no system of rates or no publications of any character which would inform their customers of the charges which would be made for a given quantity of transportation. Generally these rates have been made upon competitive bases as between the contract truck carriers and as between different lines of business. This character of discrimination as between competitors has in the past demoralized business conditions and materially affected the ability of the distributors of commodities to compete with each other in a given consuming territory.

Contract motor truck carriers generally hold themselves out to make a contract with anybody offering any quantity of freight and they will undertake to transport the freight for the general public offering it to them at differ-
[fol. 309] ent times and in different quantities upon rates which are not stabilized, are not known publicly, and such a conditions make it difficult to conduct any business at a profit which is dependent upon the transportation charge as a factor in the cost of distribution such as is the case in connection with agricultural implements. It is essential to the business institutions undertaking to use motor truck transportation to have some limitation made with regard to the rates which such contract motor truck carriers

may make so that some definite amount of transportation charge may be known as between competitors dealing in the same commodity. In this it is essential to the profitable operation of our business that minimum rates for motor truck contract carriers be fixed so that the public may know at least the minimum rate which may be made by the contract carrier as between competitors dealing in the same commodity.

These so-called motor truck contract carriers are in fact engaging in the general transportation business and it is in the public interest that such carriers be regulated so that the commerce handled by them may be conducted in an orderly and satisfactory way.

Further affiant sayeth not.

H. B. Lockett.

Sworn to and subscribed before me this the 26 day of February, 1932. Kathleen Freeman, Notary Public in and for Dallas County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 310] AFFIDAVIT OF MELROSE HOLMGREEN—Filed March 19, 1932

STATE OF TEXAS,
County of Bexar:

On this day personally appeared before me, the undersigned authority, Melrose Holmgreen, who, after being by me duly sworn, upon his oath says:

Affiant is an officer and as such is active in the management of the Alamo Iron Works, engaged in the business of manufacturing, fabricating, sale and transportation of construction steel and machinery. The principal plant of said Company is located at San Antonio, Texas, with branch plants at Houston, Harris County; Corpus Christi, Nueces County; and Brownsville, Cameron County, Texas.

That the business of said Company is one in which transportation charges are an essential element and material factor in its conduct. That unless transportation charges

are known in advance said Company cannot transact its business with any degree of certainty. That the manner in which some contract carrier trucks have handled their business in the past has made it impossible for the Company to determine from one day to the next what the transportation charges will be, and it, therefore, cannot know whether a competitor will be able to undersell the Company by reason of having secured better transportation prices than the Company. That it is deemed essential to the proper continuation of the Company's business that minimum rates of such contract carriers be fixed.

Melrose Holmgreen.

Sworn to and subscribed before me this the 29 day of February, 1932. Louis Tingg, Notary Public in and for Bexar County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 311] AFFIDAVIT OF J. E. FARROW—Filed March 19, 1932

STATE OF TEXAS,
County of Dallas:

Before me, the undersigned authority, this day personally appeared J. E. Farrow who after being first duly sworn on his oath deposed and said:

I am Traffic Manager of Brown Cracker and Candy Company and it is a part of my duties to arrange for the transportation of the commodities manufactured by it and to generally arrange for the distribution of its products. That the Brown Cracker and Candy Company is engaged in the manufacture and distribution of crackers, cake and candy with its main plant situated in the City of Dallas, Texas. That in the arranging for the transportation and distribution of the commodities manufactured by the Brown Cracker and Candy Company I contract for transportation service via railroad, common carrier motor truck and contract carrier motor truck. I am generally familiar with the practices of both forms of transportation.

The business of distributing crackers, cake and candy such as that of Brown Cracker and Candy Company is a business in which transportation charges are an essential factor and a material element in the prices paid by the consumer for the commodities. It is necessary to know in advance prior to the making of a sale approximately what the transportation charges will be in order to conduct a business of this character at a profit, and in order to meet the competition of other people engaged in the same line of business.

In the past unregulated contract motor truck carriers have maintained no system of rates or no publications of any character which would inform their customers of the charges which would be made for a given quantity of transportation. Generally these rates have been made upon competitive bases as between the contract truck carriers and as between different lines of business. Different rates have been, in the past, frequently made by the same contract motor truck carriers for identically the same quantity and character of transportation service. This character of discrimination as between competitors has in the past demoralized business [fol. 312] conditions and materially affected the ability of the distributors of commodities to compete with each other in a given consuming territory.

Contract motor truck carriers generally hold themselves out to make a contract with anybody offering any quantity of freight and they will undertake to transport the freight for the general public offering it to them at different times and in different quantities and have transported it, in the past, upon rates which are not stabalized, are not known publicly, and such conditions make it difficult to conduct any business at a profit which is dependent upon the transportation charge as a factor in the cost of distribution such as is the case in connection with the Crackers, cakes and candies. It is essential to the business institutions undertaking to use motor truck transportation to have some limitation made with regard to the rates which such contract motor truck carriers may make so that some definite amount of transportation charge may be known as between competitors dealing in the same commodity. In this it is essential to the profitable operation of our business that minimum rates for motor truck contract carriers be fixed so that the public may know at least the minimum rate which may be made

by the contract carrier as between competitors dealing in the same commodity.

These so-called motor truck contract carriers are in fact engaging in the general transportation business and it is in the public interest that such carriers be regulated so that the commerce handled by them may be conducted in an orderly and satisfactory way.

Further affiant sayeth not.

J. E. Farrow.

Sworn to and subscribed before me, to certify which witness my hand and seal of office this the 26th day of February, 1932. Kathleen Freeman, Notary Public in and for Dallas County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 313] AFFIDAVIT OF E. V. RHODES—Filed March 19, 1932

STATE OF TEXAS,
County of Galveston:

Before me, Grace Nunez, a Notary Public in and for Galveston County, Texas, on this day personally appeared E. V. Rhodes, who being by me duly sworn upon oath says:

My name is E. V. Rhodes and I reside in Galveston County, Texas, and am the Vice President of the Texas Sugar Refining Corpn., which does a general sugar business in Galveston, Harris and other counties in the State of Texas, and has been so engaged for many years; that affiant company is now and has been for many years using various means of transportation for transporting its goods, wares and merchandise; that affiant's business is one in which transportation charges are an essential element and a material factor; that unless transportation charges are known in advance of the making of shipments affiant cannot transact his business or the business of his company with any degree of certainty as to whether he or his company will make a profit or a loss; that in the past unregulated contract carrier trucks have made it impossible for him and his company to determine from one day to the next what the transportation charges will be and affiant cannot tell, even

though he hauls by contract carrier whether or not his competitor will be able to undersell him by reason of having secured an even better price than affiant or his company; that affiant's business cannot be conducted profitably under a continuation of this unregulated transportation by contract carriers and that it is essential to the profitable continuation of affiant's business that the minimum rates of such contract carriers shall be fixed and that such carriers be otherwise regulated in the public interest.

E. V. Rhodes, Vice-President Texas Sugar Refining Corpn.

Subscribed and sworn to before me this the 26th day of February, 1932, to certify which witness my hand and seal of office. Grace Nunez, Notary Public in and for Galveston County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 314] AFFIDAVIT OF G. A. TRUMBULL—Filed March 19, 1932

STATE OF TEXAS,
County of Dallas:

Before me, the undersigned, a Notary Public in and for Dallas County, Texas, on this day personally appeared G. A. Trumbull, known to me to be a credible person, who having been by me duly sworn, on oath deposes and states:

My name is G. A. Trumbull. I am President of the Huey-Philp Hardware Company of Dallas, Texas. This Company is engaged in the wholesale and retail hardware business and has been so engaged for many years prior to the date hereof. One of the important elements of cost in the operation of said business is its transportation charges on merchandise received and shipped by it; it is imperative to the successful operation of said business that those charged with its management know in advance with a reasonable degree of certainty the cost of transportation of its inbound and outbound shipments; that it is equally important to the successful operation of such business that the transportation costs of competitive concerns be on a comparable basis with those of the business of which I am President; that

unless those of us charged with the responsibility of the management of this business know these elements, it is impossible for us to determine, in the first instance, our own cost of doing business, and therefore whether we are operating at a loss or at a profit; and in the second instance, similar cost of our competitor and whether we are being discriminated against by reason of our competitors obtaining lower transportation rates and therefore being enabled to undersell us in the market.

Since the development of truck transportation, and prior to the regulation of the contract carrier, our transportation costs varied almost from day to day and, as a result, there was no established basis of these costs that could be laid down as a guide to enable us to determine the price at which we could sell our merchandise. Furthermore, it gave those engaged in the retail business an opportunity to take advantage of the wholesaler and manufacturer by stating that [fol. 315] he could buy merchandise laid down at a cost less than that at which such manufacturer or wholesaler, under his arrangement for transportation, could charge, and the manufacturer and wholesaler were not in a position to contradict or call into question such assertion for the reason that they knew that the transportation costs were dependent upon the individual whim of each truck operator. If transportation costs are regulated, these difficult problems in the operation of our business will have been eliminated. We will be able to know, with a reasonable degree of certainty, our own transportation costs and those of our competitors, and we can gauge the price of our merchandise accordingly. Furthermore, the retailer will not be in a position to put down the price of our merchandise by saying that he can purchase it elsewhere and, on account of a less cost of transportation obtain such merchandise at a lower cost than the price at which we sell it.

In other words, transportation costs are such an important element to the successful operation of a business that a slight variance will be the determining factor in the success of a business similar to the one of which I am President. The establishment of uniform and minimum rates upon the part of the carriers, whether common or contract, is essential to the stabilization of industry generally and, particularly, is it true of the industry in which I am engaged.

G. A. Trumbull.

Sworn to and subscribed before me this the 27th day of February, A. D. 1932. W. C. Goodman, Notary Public, Dallas County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 316] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Equity. No. 479

J. H. STEPHENSON, Complainant,

vs.

T. BINFORD et als., Respondents

AFFIDAVIT OF J. P. EVERHEART—Filed March 19, 1932

STATE OF TEXAS,
County of Grayson:

Before me, the undersigned authority, on this day personally appeared J. V. Everheart, a resident of the City of Sherman in said County and State, who upon his oath deposes and says:

I am Secretary of Everheart Grocery Co., a Corporation engaged in wholesale groceries and have been engaged in such business 22 years. That heretofore there has been and there is now no uniformity in transportation charges of contract truckmen. That such charges are made by contract and trade only. It is necessary for a jobber or wholesaler to know what transportation charges will be incurred in order to fix the selling price of his commodities and carry on his business in a business-like and economic way. If promiscuous rates are charged, a wholesaler or jobber is often placed at a disadvantage as his competitor by a cut transportation rate given by a truckman may secure a charge or rate that renders prices unstable.

To maintain satisfactory transportation of commodities in this state it is necessary to have uniformity of rates properly supervised and in order to stabilize and conduct

a business operated on a small margin of profit, it is essential to have a uniform system of transportation charges which it is impossible to exist in the absence of supervision and proper rate regulation.

J. P. Everheart

Sworn to and subscribed before me on this the 1st day of March, 1932. Jesse F. Hart, Notary Public in and for Grayson County, Texas.

[fol. 317] [File endorsement omitted.]

[fol. 318] AFFIDAVIT OF BEN E. KEITH—Filed March 19, 1932

THE STATE OF TEXAS,
County of Tarrant:

Ben E. Keith, being duly sworn, deposes and says that he is President of Ben E. Keith Company, which said Company is a wholesaler and distributor of fresh fruits and fresh vegetables, grocers sundries, etc. That transportation charges constitute a vital element in the business of a wholesaler and jobber. It is essentially necessary that such wholesaler and jobber know what the transportation charges are that he will be called upon to pay, as well as those that are being charged his competitors, in order to quote prices and meet competition.

Affiant further says that prior to the enactment of House Bill 335 by the Legislature of the State of Texas, there was no uniformity in transportation charges exacted by truck operators, which fact tended to render this item uncertain and unstable. It is the opinion of affiant that it is to the advantage of the distributors of merchandise and the public in general, that the minimum rates of public truck operators be regulated.

Ben E. Keith.

Subscribed and sworn to before me this the 29th day of February, A. D. 1932. Trula House, Notary Public, Tarrant County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 319] [Title omitted]

AFFIDAVIT OF IRA MEREDITH—Filed March 19, 1932

STATE OF TEXAS,
County of Grayson:

Before me, the undersigned authority, on this day personally appeared Ira Meredith, a resident of the City of Sherman in said County and State, who upon his oath deposes and says:

I am Vice President of Roberts-Sanford & Taylor Co., a Corporation engaged in wholesale hardware and have been engaged in such business 50 years. That heretofore there has been and there is now no uniformity in transportation charges of contract truckmen. That such charges are made by contract and trade only. It is necessary for a jobber or wholesaler to know what transportation charges will be incurred in order to fix the selling price of his commodities and carry on his business in a business like and economic way. If promiscuous rates are charged, a wholesaler or jobber is often placed at a disadvantage, as his competitor by a cut transportation rate given by a truckman may secure a charge or rate that renders prices unstable.

To maintain satisfactory transportation of commodities in this state it is necessary to have uniformity of rates properly supervised and in order to stabilize and conduct a business operated on a small margin of profit, it is essential to have a uniform system of transportation charges which it is impossible to exist in the absence of supervision and proper rate regulation.

Ira Meredith.

Sworn to and subscribed before me on this the 1st day of March, 1932. Jesse F. Hart, a Notary Public in and for Grayson County, Texas. (Seal.)

[fol. 320] [File endorsement omitted]

[fol. 321] AFFIDAVIT OF E. C. PRICE—Filed March 19, 1932

THE STATE OF TEXAS,
County of Tarrant:

E. C. Price, being duly sworn deposes and says that he is Manager Service Dept., of the Nash Hardware Company,

which said Company is a wholesaler and distributor of hardware. That transportation charges constitute a vital element in the business of a wholesaler and jobber. It is essentially necessary that such wholesaler and jobber know what the transportation charges are that he will be called upon to pay, as well as those that are being charged his competitor, in order to quote prices and meet competition.

Affiant further says that prior to the enactment of House Bill 335 by the Legislature of the State of Texas, there was no uniformity in transportation charges exacted by truck operators, which fact tended to render this item uncertain and unstable. It is the opinion of Affiant that it is to the advantage of the distributors of merchandise and the public in general, that the minimum rates of public truck operators be regulated.

E. C. Price.

Subscribed and sworn to before me this the 29th day of February, A. D. 1932. E. P. Singleton, Notary Public, Tarrant County, Texas. (Seal.)

[File endorsed omitted.]

[fol. 322] AFFIDAVIT OF A. J. SCRIVNER—Filed March 19, 1932

THE STATE OF TEXAS,
County of Tarrant:

A. J. Scrivner, being duly sworn deposes and says that he is Traffic Manager for Waples Platter Company, which Company is in the business of distributing and manufacturing food products by wholesale, and operates houses in Texas, Oklahoma and New Mexico.

In the conduct of its business, one of the chief elements for consideration is transportation charges. Approximately 85% of the movement of business from branch houses to customers is by motor truck. It is essentially necessary that the wholesaler or jobber know what the transportation charges will be between given points in order that such concern may successfully conduct its business. Prior to the enactment of House Bill 335 by the

Texas Legislature, Affiant had no knowledge what truck rates would be from day to day, or what rates were being charged others for transportation service. It is to the advantage of distributors in general for the minimum rates of all truck operators to be fixed and regulated.

A. J. Scrivner.

Subscribed and sworn to before me this the 29th day of February, A. D. 1932. Juanita Barham, Notary Public, Tarrant County, Texas. (Seal.)

[File endorsed omitted.]

[fol. 323] AFFIDAVIT OF SAM HANNA—Filed March 19, 1932

STATE OF TEXAS,
County of Dallas:

Before me, the undersigned, a Notary Public within and for Dallas County, Texas, on this day personally appeared Sam Hanna, known to me to be a credible person, who, having been by me duly sworn, on oath deposes and states:

My name is Sam Hanna. I am Secretary of the Texas Wholesale Grocers Association and am located at 510 Magnolia Building, Dallas, Texas. The membership of the association of which I am Secretary is comprised of over sixty per cent of the wholesale grocery concerns doing business in the State of Texas. My duties require and give me opportunity to acquaint myself with the transportation problems of the members of this association, as well as those engaged in the same line of industry not members of the association. Prior to my having become Secretary of this association, I was engaged in the wholesale grocery business for many years and, by reason of my own experience in the business and the experience that I have had as Secretary of the Wholesale Grocers Association, I know that the element of transportation costs is an important one to the industry and those engaged in it.

It is necessary that the wholesale grocers know in advance the transportation costs of their commodities if they are to operate with any degree of success, and it is equally necessary that each of those engaged in the industry know

with some degree of certainty similar costs of his competitors.

The belief is shared by virtually all Texas Wholesale Grocers that should motor trucks be allowed to continue to operate without being regulated, chaos will result to the entire Texas jobbing and retail grocery trade, as well as other industries, for without regulation and no uniform cost of transportation, discrimination between jobbers and retailers is created, which discrimination extends to towns or communities and ultimately to the consumer.

[fol. 324] The Stabilization of transportation costs will, in my opinion, result in stabilization of industry generally, and will permit those engaged in industries to establish the approximate cost of one of the principal factors of overhead expense.

Sam Hanna.

Sworn to and subscribed before me this the 27th day of February, A. D. 1932. Louise McNatt, Notary Public, Dallas County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 325] AFFIDAVIT OF C. E. HINDS—Filed March 19, 1932

STATE OF TEXAS,
County of Dallas:

Before me, the undersigned authority, this day personally appeared C. E. Hinds who after being first duly sworn on his oath deposed and said:

I am Traffic Manager of Butler Bros., at Dallas, Texas, and it is a part of my duties to arrange for the transportation of the commodities handled by Butler Bros., and to generally arrange for the distribution of their traffic. Butler Bros. are engaged in the wholesale distribution of general merchandise and have establishments at Dallas, Texas; St. Louis, Missouri; San Francisco, California; Chicago, Illinois; New York City, and at various other places throughout the United States. That in arranging for such transportation service necessary for the distribution of the commodities handled by Butler Bros., I contract for trans-

portation service via railroad, by common carrier motor truck and by contract carrier motor truck. I am familiar with the practices of both forms of transportation.

The business of distributing general merchandise such as that of Butler Bros., is a business in which transportation charges are an essential factor and a material element in the prices paid by the consumer for the commodity. It is necessary to know in advance prior to the making of a sale approximately what the transportation charges will be in order to conduct a business of this character at a profit, and in order to meet the competition of other people engaged in the same line of business.

In the past unregulated contract motor truck carriers have maintained no system of rates or no publications of any character which would inform their customers of the charges which would be made for a given quantity of transportation. Generally these rates have been made upon competitive bases as between the contract truck carriers and as between different lines of business. Different rates have been in the past frequently made by the same contract motor truck carriers for identically the same quantity and character of transportation service. This character of dis- [fol. 326] crimination as between competitors has in the past demoralized business conditions and materially affected the ability of the distributors of commodities to compete with each other in a given consuming territory.

Contract motor truck carriers generally hold themselves out to make a contract with anybody offering any quantity of freight and they will undertake to transport the freight for the general public offering it to them at different times and in different quantities and have transported it, in the past, upon rates which are not stabilized, are not known publicly, and such conditions make it difficult to conduct any business at profit which is dependent upon the transportation charge as a factor in the cost of distribution such as is the case in connection with general merchandise. It is essential to the business institutions undertaking to use motor truck transportation to have some limitation made with regard to the rates which such contract motor truck carriers may make so that some definite amount of transportation charge may be known as between competitors dealing in the same commodity. In this it is essential to the profitable operation of our business that minimum

rates for motor truck contract carriers be fixed so that the public may know at least the minimum rate which may be made by the contract carrier as between competitors dealing in the same commodity.

These so-called motor truck contract carriers are in fact engaging in the general transportation business and it is in the public interest that such carriers be regulated so that the commerce handled by them may be conducted in an orderly and satisfactory way.

Further affiant sayeth not.

C. E. Hinds, T. Mgr.

Sworn to and subscribed before me, to certify which witness my hand and seal of office this the 26th day of February, 1932. Kathleen Freeman, Notary Public in and for Dallas County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 327] AFFIDAVIT OF F. I. CAIRNS—Filed March 19, 1932

THE STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared F. I. Cairns, known to me, who being by me duly sworn, deposes and says:

My name is F. I. Cairns, I am a resident of Houston, Harris County, Texas, and I am now employed in the capacity of special statistician for the Texas & New Orleans Railroad Company. I have had thirty-six years in railroad service, of which twelve years was as division auditor, the balance all in operating departments in various clerical positions including that of Chief Clerk in Superintendent's office and General Manager's office and dealing throughout most of the period with operating statistics and during the last few years have appeared in a number of cases before the Interstate Commerce Commission and Railroad Commission of Texas. The last twelve years has been devoted to railroad employment in Texas. I am reasonably familiar with the lines of and territory served by

the various railroads of Texas and with the railroad statistics embodied in carrier reports to the various commissions including operations of the Texas carriage, the tonnage they transport and the revenue that they receive therefor.

Section 22b of House Bill 335, Chapter 227 of the General Laws of the 42nd Legislature, Regular Session, provides as follows:

"Section 22b. Declaration of Policy.—The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public."

Texas has the greatest rail mileage of any State in the Union, its total being 16,890.64 miles of roads as of Decem- [fol. 328] ber 31, 1929. A glance at a railroad map indicates that the rail lines honeycomb the entire state and that there is scarcely a conceivable movement of traffic which could not be handled by rail. I have supervised the preparing of certain data which is attached hereto marked Exhibits "A" to "J" inclusive, which data shows that the rail carriers of Texas possess plants capable of handling efficiently and readily commerce of the State. That during the past few years heavy quantities of tonnage have been diverted from them to other transportation agencies. That, as a consequence, a large part of their facilities lie idle and unused and that, despite the strongest transportation

economies and a tremendous increase in efficiency of operation their ability to continue to render adequate and dependable service is greatly threatened. They are capable at this time of rendering more efficient public service than at any time in the past.

All of the rail carriers of the State are not included in the exhibits. The Missouri-Kansas-Texas Railroad Company, St. Louis, Brownsville & Mexico Railway Company, Ft. Worth & Denver City Railway Company, Kansas City, Mexico & Orient Railway Company, Texas & New Orleans Railroad Company, St. Louis, Southwestern Railroad Company, Panhandle & Sante Fe Railway Company, San Antonio, Uvalde & Gulf Railroad Company, International-Great Northern Railroad Company, and The Beaumont, Sour Lake & Western Railway Company have been selected as a basis for this data. These twelve carriers embody practically 85% of the Class 1 rail mileage of the State and represent perhaps the strongest rail lines in the State, whether measured by the traffic they transport or by their financial resources. Their operations cover all parts of the State. In showing statistic- data with respect to them and in depicting the effect the diversion of traffic during the past few years has had on them, the picture thus presented is illustrative of the situation with respect to all the rail lines in Texas. The precarious position ocupied by these carriers is true to an equal, or even greater degree, of other and weaker common carriers by railroad in the State and they generally are less capable of continuing adequate and dependable service if the diversion of traffic to other means of transportation is allowed to continually take place and increase without regulation and control.

Attention is first directed to Exhibit "A", a series of [fol. 329] maps on which the Texas lines of the Missouri Pacific, and T. & N. O. are shown. Each of these maps shows the line of the carrier, the territory within which its affiliated transportation company rendering pickup and delivery services operates, and, in addition, on some of the maps, the common carrier motor trucks paralleling the rail lines. The legend appended to each map makes it self-explanatory. A word of comment with respect to the first, that showing the facilities of the Missouri Pacific, will suffice.

On the latter, the Missouri Pacific rail lines are shown in heavy solid white lines. The heavy broken white line indicates the scope of the operations of the Missouri Pacific Transportation Company, while the lighter broken white lines paralleling the rail carriers in each case show common carrier trucks. It should be borne in mind in this connection that only those common carrier trucks which parallel the rail carriers are shown. These are common carrier truck operators other than those indicated, operating between many of the termini shown, and transporting traffic between such points over other routes, which are not included.

The Ft. Worth-Houston situation might be cited as illustrative. Between these two points five rail carriers, I.-G. N., B. R. I., T. & N. O., M.-K.-T. and G. C. & S. F., and at least four common carrier motor truck lines, Houston & North Texas Motor Freight Lines, Sproles Motor Freight Lines, Prescott Motor Truck Lines, and Central Motor Freight Terminal Company operate. As shall later be demonstrated, each of the rail lines listed is operating at this time over this section of its line, far below capacity. The service is now far more than adequate.

What has been said with respect to the Ft. Worth-Houston situation applies with equal force to practically all other points reached by the carriers shown. Without further comment we submit the exhibits as a showing of the existing rail facilities to the extent indicated, the areas within which pickup and delivery service is given by them, and of the common carrier motor truck operations paralleling these rail lines. Each of the two latter features will be separately treated in detail.

This situation shown for the two roads indicated is typical of the other Texas rail carriers. Exhibit B, consisting of 13 mimeographed sheets, contains a summary of certain operating and statistical data for each of the lines [fol. 330] listed hereinabove, together with a consolidated summary embodied in Sheet 1. With respect to the T. & P., T. & N. O., G. C. & S. F., and P. & S. F., the exhibit includes their entire operations both in and out of Texas, no segregation by state lines being available for certain of the items. Attention is first directed to Sheet 1. The consolidated summary for the year 1931 is not comparable with

the data shown for the preceding years, since the T. & P. was unable to furnish the information for 1931, and, as indicated by the note, has not been included in the figures shown for that year. Despite this fact, however, the averages per mile of road, due to the fact that the mileage of the T. & P. as well as its revenues, expenses and performance have been included, are fairly comparable. Beginning with the year 1921, data are presented for each succeeding year to date. It is, of course, well known that 1921 was itself a year of depression. It, and the intervening period, may therefore be fairly compared with the showing for 1930 and 1931.

In 1921 these carriers operated in excess of 14,000 miles of road, representing a property investment of over $675,000,000. The intervening period between 1921 and 1929 was one of substantial growth. Mileage grew to more than 15,300 and property investment increased to about $916,000,000. Texas was experiencing a marked development, and its rail plant more than kept pace with its growth. Bearing these facts in mind, attention is directed to the average per mile of road. Freight revenue per mile of road in 1921 aggregated $11,156, rose to $12,725 in 1927, dropped in 1930 to $10,643, 95 per cent of the 1921 figure, and to $7,081 in 1931, 63 per cent of the 1921 figure, and approximately 55 per cent of the average for 1927. Revenue ton miles in 1921 averaged 718,511 per mile of road, rose in 1928 to 1,046,597, dropped in 1930 to 886,764 and to 629,748 in 1931. The ton miles during the latter year represented only about 63 per cent of the average for 1928, and were actually about 90,000 less than in 1921. In 1921 on every ton of freight hauled the rail lines earned $2.97. Through each of the succeeding years the earnings materially declined. In 1930 they were only $2.37 per ton, 77 per cent of the 1921 figure, and in 1931, $2.14, 72 per cent of the average for 1921. The property investment of these carriers in 1930 was approximately 37 per cent greater than in 1921. Despite this fact the freight [fol. 331] revenue per mile of road for the year 1931 was lower than in any of the preceding years, and the ton mile performance in 1931 was less than that of 1921, or any of the succeeding years.

This heavy loss in freight revenue and in ton mile performance, coupled with the material decline in revenue per

ton of freight handled, has been accompanied by sweeping reductions in operating expenses. Total railroad operating expenses in 1921 averaged $11,300 per mile of road. In 1930, despite a greater ton mile performance this had been reduced to $9,830, 86 per cent of the 1921 figure, and in 1931 there was still further decline to $6,758, only 60 per cent of the average for 1921. In spite of these rigorous economies, the rate of return in 1930 was only 3.06 per cent, and in 1931 1.43 per cent, lower than for any of the preceding years shown.

The exhibit also shows another pertinent fact. In 1931, these carriers (excluding the T. & P.) paid a total of more than $7,200,000 in taxes. Their total net railway income during that year, out of which interest on bonds and other non-operating expenses must be paid, was only a little over $10,700,000.

The above indicates the general nature of the exhibit, and the purpose for which it is presented. Pages 2 to 13 thereof offer a separate picture of the operations of each individual line. Collectively they indicate that the rail carriers now possess, by reason of the heavy increase in their investment, a transportation plant capable of rendering a greater service than ever before. While this is true, the last few years has witnessed a material decline in their tonnage and revenues. Their present low rate of return is in many instances insufficient to take care of interest on bonds, and other non-operating expenses.

The pages of the exhibit dealing separately with the I.-G. N. reflect a material increase in revenues and in tonnage for the year 1931. This is attributable solely to the oil development in eastern Texas, and to the heavy quantity of crude oil which moved over the lines of that carrier during a limited period. This movement has now almost wholly ceased.

The data embodied in Exhibit B is taken from the annual reports of the carriers to the Railroad Commission of Texas [fol. 332] for the years 1921 to 1930, inclusive, the information for 1931, where shown, being supplied by each individual line, and equated on the basis indicated in the note.

Exhibit C was taken from the annual reports to the Railroad Commission of Texas, and contains certain freight statistics for each of the lines shown. The 1931 data indicated are for the first eight months of that year, and were secured from the individual records of each carrier. The

exhibit shows for the years 1923 to date, carload tonnage originated and carried, less than carload tonnage originated and carried, and finally for each line a consolidated statement by years of the total tons of revenue freight carried. Here, too, we direct attention to the noticeable decline in traffic during 1930 and 1931. The competition of motor truck carriers, has, of course, been most severely felt in connection with less than carload traffic, although they have made material inroads in carload tonnage, as shall later appear. Particular attention is directed to the heavy loss of less than carload traffic that practically every carrier shown has experienced during the past nine years. As an illustration, the M-K-T in 1930 originated only about 40 per cent of the less than carload tonnage originated in 1923. The information for 1931 is for 8 months. Equated to an annual basis this is the equivalent of 31,065 tons, only 22.6 per cent of the total for 1923. A like striking picture is presented in connection with the other carriers shown.

Exhibit C, however, by no means presents a complete picture, particularly with respect to merchandise traffic.

Exhibit D which follows supplements same. In the latter, the individual lines have compiled from their records, some by stations and others for their lines as a whole, a statement of the number of cars of less than carload traffic originated by them, with the average loading per car, for the month of September from the year 1923 to date. As an illustration, the M. K. T. in September, 1923, originated more than 37,000,000 pounds of merchandise traffic. This rose during the same month in 1926, to more than 44,000,000 pounds. Through each of the succeeding years, however, [fol. 333] there was a material decline, and in September, 1931, this carrier originated only a little more than 19,500,00- pounds of less than carload traffic, approximately 52 per cent of the total for 1923. In September, 1923, however, 3,457 cars were required to handle the traffic, while in September, 1931 3517 cars were necessary, an actual increase of 60 cars over September, 1923. The average loading per car dropped from 10,801 pounds in 1923 to 5,546 pounds in 1931, a decline of approximately 50 per cent. Avoiding repetition, it can be said that for each of the stations and lines shown, a like showing is presented. This exhibit demonstrates that while heavy losses in less than carload traffic have been suffered the rail lines have

been required to continue substantially the same number of cars in the service as were formerly used. With respect to the M. K. T. without putting one additional car in service, it can handle at least twice as much less than carload traffic as it is now transporting, and still do no more than reach the approximate average loading enjoyed in 1923. The cars in merchandise service, however, have a capacity generally of about 80,000 pounds, and even though the present loading on this carrier increased fourfold it would still be utilizing only approximately 25 per cent of the carrying capacity of the cars. These facts are equally true of the other carriers listed in the exhibit.

With reference to diversion to trucklines, of carload traffic which formerly moved by rail, Exhibit E is partially indicative of the extent to which this diversion has progressed. Competition has been keenly felt in the movement of animals and products, bagging and ties, cottonseed cake and meal, canned goods, as well as on a variety of other carload commodities. Cotton is, of course, any quantity traffic, but it has been included in the exhibit to indicate the losses that have been suffered by individual lines. Exhibit E shows for these forms of traffic, as well as for all less than carload freight, the tons carried during the years 1927 to 1930, inclusive, and in connection with some lines, for a part of the year 1931. While the exhibit is self explanatory, particular attention is directed to the [fol. 334] total for the lines listed, contained on page 3 of the exhibit. Roughly the carrier losses during the four year period 1927 to 1930 inclusive, exceeded 1,000,000 tons of cotton, 500,000 tons of cake and meal, 900,000 tons of animals and products, 14,000 tons of canned food products, n. o. s.* and 300,000 tons of less than carload freight. Bagging and ties dropped from approximately 106,000 tons in 1928 to about 81,000 tons in 1930. If like data could be presented for other forms of carload traffic a similar result would be shown.

The losses of carload traffic have not been confined to any particular area. This is demonstrated by Exhibit F, a statement prepared by the G. C. & S. F. Ry. Co., showing

---

*n. o. s. in traffic is an abbreviation for "not otherwise specified."

carload freight forwarded and received at designated stations during the month of September in each of the years 1923 to 1931, inclusive. Twenty-five representative interior points are listed. In 1923 the Santa Fe forwarded and received at these points 87,589 tons of carload freight. The years which followed, up to 1927 and 1928, show a marked growth. In September, 1931 however, at these same points, only 48,931 tons of carload freight were forwarded and received, only a little more than 55 per cent of the traffic originated and delivered at the same points in 1923, a nine year earlier period.

Exhibit F (1) shows the less than carload tonnage forwarded and received during the month of September, for the years 1923 to 1931 inclusive, by the G. C. & S. F. Ry. Co., at the same 25 stations covered by Exhibit F. The decline in this form of traffic is even more pronounced than [fol. 335] was true in connection with carload freight covered by Exhibit F. In September, 1923, at these 25 stations, the G. C. & S. F. forwarded and received a total of 13,227 tons of less than carload freight, while during the same month of 1931 only 4,488 tons moved from and to these points, only 33 per cent of that which moved in September of the year 1923.

Exhibit G deals specifically with cotton, showing the truck and rail receipts thereof at Houston, Texas City, Galveston and Corpus Christi, Pages 1 and 2 of the exhibit cover the entire years, 1927 to 1930, inclusive, and the first ten months of 1931. In order to present a comparable showing pages 3 and 4 of the exhibit have been prepared. In these the receipts by rail and truck are shown for the first ten months of each of the years 1927 to 1931, inclusive. The heavy increase in the proportion of the receipts at Houston and Corpus Christi delivered by truck, is particularly noticeable.

Attention is directed to the consolidated summary for the four ports contained on page 4 of the exhibit. During the ten months of 1927, a little more than 5,000,000 bales of cotton were delivered at these points of which 95 per cent moved by rail. In 1931, however, slightly over 3,400,000 bales were received up to October 31st, 1931, and of this total only 57 per cent moved by rail. The rail receipts for the first ten months of 1927 amounted to 4,780,603 bales, while during the same period in 1931 the rail lines delivered only 1,945,252 bales, a decline of 59 per cent. On the other hand the trucks

delivered to these same ports for the first ten months of 1927, 249,296 and for the same period in 1931, 1,475,942 bales, an increase of 488 per cent. Cotton represents the largest single agricult-ral product of the South and of Texas. This heavy loss has taken from the rail lines the commodity which represents the backbone of their traffic. The revenue consequences have been far reaching.

Exhibit H deals specifically with particular sections of the lines of the individual carriers. This exhibit shows by operating divisions the net ton miles per mile of line for each of the years 1923 to 1930. This exhibit should be studied in connection with map Exhibit A which presents in picture form the lines indicated.

[fol. 336] Exhibit H indicates the extent to which individual portions of the lines of these carriers are being utilized in the transportation of freight. During the years 1927 to 1929 inclusive, the T & P enjoyed a heavy movement of crude petroleum, particularly from the section of its line in the extreme western portion of the state in the vicinity of Pecos. This movement is reflected in the ton mile statistics for these three years for that carrier. The line from Big Spring to Baird known as the Baird Subdivision, is a single track line. Over this subdivision 5,180,713 net ton miles per mile of line moved in 1928. This density supplies an indication of the quantity of tonnage which can be moved over a single track line, of which by far the greater part of the divisions or subdivisions shown in the exhibit are composed. This figure can be contrasted with the actual density on the other subdivisions listed in the exhibit. In no instance, except where some unusual influence has manifested itself during a particular year and for a limited period has this density been approached on any other subdivision shown. Generally it ranges from 1,000,000 net ton miles per mile of line downward, except for certain peculiar portions of line over which heavy quantities of overhead traffic move. The exhibit establishes that with their existing lines of railroad, the rail carriers shown can handle a far greater volume of traffic than that which is now moving over their rails.

Exhibit H which has just been discussed, indicates the extent to which the rails of the carriers are being utilized. Exhibit I is supplementary in nature, and shows the extent to which motive power is being utilized. The information embodied in the exhibit was not available for all of the carriers,

but those for whose account the data are offered are representative.

Common carriers by railroad follow the policy of keeping in service only such engines as are required to handle with expedition the traffic available and tendered for movement.

When tonnage slackens and recession occurs motive power is withdrawn, the engines being placed in storage awaiting a return to normal, at which time they are again placed in service. For these reasons the percentage relationship of [fol. 337] the gross ton miles to the rating ton miles does not present a complete picture of the additional traffic that could be transported with the motive power available. It simply shows the additional tonnage that could be moved on the engines then actually in service.

Attention is first directed to the sheet of Exhibit I presenting the data for the account of the M.-K.-T. It will be observed that in 1926 the engines of this carrier had a gross rating of more than 4,500,000,000 ton miles, and that they actually moved more than 3,600,000,000 gross ton miles, the percentage relationship of the performance to the rating ton miles being 80.74 per cent. In 1930, on the other hand a number of engines had been withdrawn from service, the rating ton miles in that year being a little more than 3,700,000,000.

During the same period, however, gross ton miles dropped to 2,600,000,000 and despite the heavy reduction in rating the percentage relationship of the gross ton miles to the rating ton miles was only about 71 per cent. For the first nine months of 1931 there was a still further material decline in rating with a heavy drop in ton miles, and the percentage relationship of the gross ton miles to the rating ton miles was only about 64 per cent. The latter figure means that without placing one more engine in service and without employing one additional crew, the M.-K.-T. could have transported 36 per cent more traffic than it actually moved. Of course, by utilizing the additional engine supply available, but not actually in service on which the M.-K.-T. is carrying a heavy investment from which it is securing no return, an even stronger showing would be made.

What has been said with respect to the M.-K.-T., supplies a sufficient explanation of the figures for the other carriers which follow. Particular attention is directed to the data relating to the G. C. & S. F. Ry Co. which shows by divisions

the percentage relationship of the gross ton miles to the rating ton miles for a like period. The small amount of the available motive power being used in 1931 on the different divisions of this carrier is worthy of special note.

Exhibit J shows for the account of each of the lines, with [fol. 338] a consolidated total, the freight train miles during the years 1921 to 1930 with an equated total for 1931 based upon operations for the first nine months of that year. In studying this exhibit it should be borne in mind that these carriers operated 14,024 miles of road in 1921 as contracted with 15,384 miles in 1930, an increase of more than 1,300 miles. A material increase in train mileage might therefore be logically expected. Since the data for the T. & P. was not available for 1931, a separate total excluding that carrier in each year, has been compiled, in order that a comparable showing might be secured. Using these totals in 1921, these carriers produced 19,438,777 freight train miles. This increased in 1927 to 24,429,130 freight train miles, dropped in 1930 to 20,362,044 and in 1931 to 18,081,738. In so far as the I-G.N. is concerned, the latter figure is of course, highly inflated, due to the temporary stimulus of the heavy crude oil movement that line experienced for a limited period. Despite this fact however, the figure for the latter year was only 79 per cent of the peak reached in 1928, and materially less than the total ten years earlier in 1921.

The averages per mile of road, due to the increase in the mileage operated, supplies a more accurate comparison. In 1921 the freight train miles of these carriers, again excluding the T. & P. averaged 4.41 for every mile of road operated each day during the year. There followed in the intervening years a material increase, the peak being reached in 1927 when 5.21 train miles per day were made for every mile of road. This dropped in 1930 to only 4.15 freight train miles per mile of road per day, materially less than the average for 1921, a 10 year earlier period, and in 1931 the average was only 3.63 miles per mile of road per day.

This decrease in train mileage is attributable in all instances to a decrease in the number of freight trains in service. Of course the train mileage bears a direct relationship to the quantity of traffic available and tendered for movement, although, of course even when traffic is light the carriers must continue to operate certain trains. The reduced mileage in 1931 means that a smaller number of freight

trains are now being operated and that crews which were formerly required for their operation are now no longer necessary and have been thrown into unemployment. The situation with respect to unemployment through discontinuance of train service is further extended or aggravated in that it causes reductions in locomotive shops, engine houses, [fol. 339] car shops, track maintenance forces, station forces, in fact it ramifies itself through almost every department of the railroad. The heavy traffic diversion has seriously affected the operations of these carriers. The public suffers in impaired service when tonnage is not available to justify a continuance of sufficient train service.

Briefly, the foregoing exhibits present a concise picture of the operation of these carriers, the tonnage they transport and of their present precarious financial condition. The heavy loss of traffic to competing transportation agencies which have heretofore been practically unregulated has also been shown. It is my opinion that unless such transportation agencies are subjected to proper regulations in the public interest, those continuing effects will eventually accomplish the result of bringing these rail carriers to destruction.

As previously indicated, train service has already been substantially reduced and these carriers are faced with the necessity of effecting every economy in operation which can be accomplished. These are subjects in which the public is vitally interested.

Further deponent saith not.

F. I. Cairns.

Subscribed and sworn to before me this 9th day of March A. D. 1932. Helen D. Kelley, Notary Public in and for Harris County, Texas.

[File endorsement omitted.]

Exhibits "A" to "J", both inclusive, described in this affidavit detached and sent up with Transcript of Record to Supreme Court in original form, in accordance with Order of Court dated August 16, 1932.

[File endorsement omitted.]

[fol. 340] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AND ORDER THEREON APPROVING STATEMENT OF EVIDENCE—Filed August 16, 1932

It is hereby stipulated by the original complainant, the complainant-intervenors and the respondents in the above entitled and numbered cause, acting herein by and through their respective attorneys of record, that:

(1) The foregoing statement of evidence comprizes all of the evidence taken in the above entitled and numbered action, which is relevant and material to the hearing of the appeal on said action, all such evidence not directly material and essential to the decision and the questions presented on this appeal having been omitted;

(2) It is agreed that all parties hereto have received due and legal notice of the statement of evidence as is required by Equity Rule No. 75 (28 U. S. C. A., paragraph 723), and service of such notice is hereby accepted, and further notice of filing of said statement is hereby waived;

(3) It is agreed that such statement as made may be approved by the three judges before whom said cause was tried, without further notice to the parties hereto, and when [fol. 341] so approved may be filed in the Clerk's office and become a part of the record for the purposes of the appeal taken in this action by the complainant and complainant-intervenors herein.

Fulbright, Crooker & Freeman, Franklin & Blankenbecker, Attorneys of Record for Complainant and Complainant-intervenors W. S. Finnegan, P. E. Arnett, B. E. Ites, V. C. Bilbo, J. T. Carroll, and A. S. Robinson. Franklin & Blankenbecker & Joe J. Shaw, Attorneys of Record for Complainant-intervenor D. A. Beard. James V. Allred, Atty. Gen. of Texas; T. S. Christopher, Elbert Hooper, Attorneys of Record for Respondents.

[fol. 342] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER

It appearing that the herewith and foregoing statement of evidence was lodged in due time with the Clerk of this Court, and that the attorneys for all parties to the said action have agreed that said statement may be approved without further notice to any of said parties, and it appearing that said statement is true, complete and properly prepared, and that it contains all of the evidence relevant and material to a hearing of the question to be presented on the appeal in said action;

It is therefore ordered that the same be allowed, settled and approved as a true, complete and correct statement of the evidence of said action.

Dated this the 16 day of August, A. D. 1932.

J. C. Hutcheson, Jr., United States Circuit Judge. Duval West, United States District Judge. T. M. Kennerly, United States District Judge.

[File endorsement omitted.]

[fol. 343] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DIRECTING ORIGINAL PAPERS TO BE FORWARDED WITH RECORD ON APPEAL—Filed August 16, 1932

On this the 16 day of August, A. D. 1932, came on to be heard the petition of complainant and complainant-intervenors in the above entitled and numbered cause, seeking an order directing that the exhibits attached to and made a part of the affidavit of F. J. Cairns introduced in this cause on hearing for permanent injunction, be sent up in their original form for inspection by the Supreme Court of the United States, as a part of the record sent to said Supreme Court of the United States in connection with the appeal taken in this cause, and it appearing to the Court that it is both necessary and proper that said original ex-

hibits should be inspected by the Supreme Court of the United States upon the appeal of this cause, and that said exhibits should not be included in the printed record:

It is, therefore, ordered that all of the exhibits attached to and made a part of the affidavit of F. J. Cairns, introduced in this cause on hearing for permanent injunction, be forwarded in their original form to the Supreme Court of the United States, along with the transcript of record in this cause.

J. C. Hutcheson, Jr., United States Circuit Judge.
Duval West, T. M. Kennerly, United States District Judges.

[fol. 344] [File endorsement omitted.]

[fol. 345] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 346-347½] Citation, in usual form, showing service on James V. Allred et al., filed July 7, 1932, omitted in printing.

[fol. 348] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—Filed Aug. 1, 1932

On this, the 1 day of August, A. D. 1932, came on to be heard the joint petition of all complainants and all respondents in the above entitled and numbered cause, acting by and through their respective attorneys of record, seeking an enlargement of the time for the docketing of this cause and the filing of the record thereof in the Supreme Court of the United States; and it appearing to the Court that good cause has been shown why such an extension and enlargement of time should be granted, and that this request is being made prior to the expiration of the time stated in the citation:

It is, therefore, ordered, adjudged, and decreed by the Court that the time for docketing the above entitled case

and filing the record thereof with the Clerk of the Supreme Court of the United States, be and it is hereby enlarged and extended until the first day of September, A. D. 1932, and it is further ordered that this order of enlargement be filed with the Clerk of the Supreme Court of the United States.

J. C. Hutcheson, Jr., United States Circuit Judge. Duval West, United States District Judge. T. M. Kennerly, United States District Judge.

[fol. 349] [File endorsement omitted.]

[fol. 350] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, AT HOUSTON

Equity. No. 479

J. H. STEPHENSON, Complainant,

vs.

T. BINFORD et als., Respondents

Before Hutcheson, Circuit Judge, and West and Kennerly, District Judges

OPINION OF THE COURT ON FINAL HEARING—Filed August 26, 1932

Per CURIAM:

Though the record on the final hearing does contain some evidence in addition to that which it contained when the opinion on the application for temporary injunction was written, the case as it now stands for decision is in no substantial particular different from the one we had before us then.

We have not been cited to, nor have we found, any decision rendered since which seems to either the majority or the minority to require a change in the views expressed in that opinion. We therefore refer to and adopt it as our opinion on final hearing in this cause.

[File endorsement omitted.]

A True Copy I Certify. Attest:
L. C. Masterson, Clerk, by F. D. Evans, Deputy.
(Seal United States District Court, Southern District of Texas.)

[fol. 351] IN UNITED STATES SUPREME COURT

STATEMENT OF POINTS APPELLANTS INTEND TO RELY UPON AND STIPULATION TO PRINT ENTIRE RECORD—Filed Aug. 30, 1932

Point I

The provisions of House Bill No. 335, passed by the 1931 Legislature of Texas, as applied to appellants, all of whom are private contract carriers, are tantamount to compelling appellants to dedicate their property to the quasi public use of public transportation before they can operate their motor vehicles as carriers for hire over the highways of the State of Texas, resulting in the taking of their property for public use without adequate compensation, and thus depriving them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Point II

Appellants being carriers for hire under private contract, their business is in no sense "affected with a public interest," hence the provisions of House Bill No. 335, passed by the 1931 Legislature of Texas, compelling appellants to obtain permits which are in effect certificates of public convenience and necessity, before they are permitted to use the highways in pursuit of their business and which said Act regulates their business by (a) subjecting them to the rules and regulations of the Railroad Com-[fol. 352] mission, whose duty it is made to fix, prescribe or approve the maximum or minimum, or maximum and minimum, rates, to prescribe rules and regulations necessary for their government, and to require such monthly annual or other reports and data from them as the Commission may deem necessary, and to regulate them in all matters affecting the relation between them and the ship-

ping public, whether it is specifically mentioned in the Act or not; (b) prohibiting them from collecting lesser rates for their services than the minimum prescribed for common carriers for substantially the same service, and (c) placing their business generally under the control and regulation of the Railroad Commission, deprives them of their property without due process of law, and in this is in contravention of the Fourteenth Amendment to the Constitution of the United States.

Point III

Appellants being carriers for hire under private contract, their business is one wholly unaffected with a public interest, and the Legislature cannot by mere legislative declaration convert such purely private business into one affected with a public interest, so as to be able to control and regulate the business of appellants as is done through the provisions of House Bill No. 335, passed by the 1931 Legislature of Texas. This enactment regulates the business of appellants by (a) demanding of them a permit which is in effect a certificate of public convenience and necessity before they can operate their motor vehicles in pursuit of their business; (b) prohibiting them from collecting lesser rates for their services than the minimum prescribed for common carriers for substantially the same service; (c) subjecting them to the rules and regulations of the Railroad Commission, whose duty it is made to fix, prescribe or approve the maximum or minimum, or maximum and minimum, rates, to prescribe rules and regulations necessary for their government, and to require such [fol. 353] monthly, annual or other reports and data from them as the Commission may deem necessary, and to regulate them in all matters affecting the relationship between them and the shipping public, whether it is specifically mentioned in the Act or not; (d) requiring that they carry insurance to cover the cargo that is being transported by them; and (e) requiring that they keep accounts strictly in accordance with such classification of accounts and rules as may be prescribed by the Commission and to file reports and such other data as the Commission may deem necessary. Said provisions of the Act, as applied to appellants, deprive them of their property without due process

of law, and in this are in contravention of the Fourteenth Amendment to the Constitution of the United States.

Point IV

House Bill No. 335, passed by the 1931 Legislature of Texas, requires that appellants obtain a permit which is in the nature of a certificate of public convenience and necessity and subjects defendants to other regulations before they can lawfully operate upon the highways, which said requirements are not made as to certain designated private carriers similarly situated and in this appellants are denied the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

Point V

House Bill No. 335, passed by the 1931 Legislature of Texas, denies to appellants the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it regulates their business and the conduct thereof on the highways of the State of Texas in a number of particulars, which said regulations [fols. 354 & 355] it does not apply to persons using highways who are transporting their own commodities under substantially the same conditions.

Fulbright, Crooker & Freeman, Attorneys for Complainant J. H. Stephenson and Complainant-intervenors W. S. Finnegan, P. E. Arnett, V. C. Bilbo, B. E. Ites, J. T. Carroll, and A. S. Robinson. Franklin & Blankenbecker & Jas. J. Shaw, Attorneys for Complainant-intervenor D. A. Beard.

Service of a copy of the foregoing statement of points relied upon on appeal to the Supreme Court of the United States, on the undersigned as attorneys of record for the respondents, is hereby acknowledged, this the 25th day of August, A. D. 1932.

James V. Allred, Atty. General, by T. S. Christopher, Asst. Atty. Gen., Attorneys for Respondents.

[fols. 356 & 357] STIPULATION

It is hereby stipulated by and between the parties hereto that the entire record now on file (subject to such omissions as the Clerk shall make pursuant to paragraph 9 of Rule XIII) shall be printed, it being the agreement of the parties hereto that the same is necessary for the consideration by the Supreme Court of the United States of the statement of the points upon which appellant intends to rely on appeal.

Fulbright, Crooker & Freeman, Attorneys for Complainant J. H. Stephenson and Complainant-intervenors W. S. Finnegan, P. E. Arnett, V. C. Bilbo, B. E. Ites, J. T. Carroll, and A. S. Robinson. Franklin & Blankenbecker & Jas. J. Shaw, Attorneys for Complainant-intervenor D. A. Beard. James V. Allred, Atty. General, by T. S. Christopher, Asst. Atty. Gen., Attys. for Respondents.

[fol. 358] [File endorsement omitted.]

Endorsed on cover: File No. 37,023. S. Texas D. C. U. S. Term No. 326. J. H. Stephenson, W. S. Finnegan, P. E. Arnett, et al., appellants, vs. T. Binford, O'Brien Stevens, R. J. Martin, et al. Filed August 30, 1932. File No. 37,023.

FILE COPY

SEP 14 1932

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 326.

J. H. STEPHENSON, ET AL., *Appellants*,

vs.

T. BINFORD, ET AL., *Appellees*.

JOINT MOTION OF APPELLANTS AND APPELLEES TO ADVANCE.

FULBRIGHT, CROOKER & FREEMAN,
Attorneys of Record for Complainant,

J. H. STEPHENSON, *and Complainant-intervenors*, W. S. FINNEGAN, P. E. ARNETT, B. E. ITES, V. C. BILBO, J. T. CARROLL and A. S. ROBINSON.

FRANKLIN & BLANKENBECKER,
JAS. J. SHAW,
Attorneys of Record for Complainant-intervenor D. A. BEARD.

JAMES V. ALLRED, *Attorney General*,

ELBERT HOOPER, T. S. CHRISTOPHER, *Asst. Atty. Generals, Attorneys of Record for Respondents, Appellees herein.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 326.

J. H. STEPHENSON, ET AL., *Appellants,*

vs.

T. BINFORD, ET AL., *Appellees.*

JOINT MOTION OF APPELLANTS AND APPELLEES TO ADVANCE.

May it Please the Court:

Come now the appellants and appellees in the above entitled and numbered cause, and respectfully move this Honorable Court that this case be advanced for early hearing, and in support of their motion make the following brief statement of the matters involved and the reasons relied upon for the advancement:

I.

The Forty-second Legislature of Texas, at its regular session in 1931, enacted House Bill, 335, Chapter 277, page 480. The Act became effective on August 22, A. D. 1931.

Appellants assert they are contract carriers and are operating upon the highways of the State of Texas as such. They brought this action for the purpose of restraining the enforcement of said House Bill 335 as against them, contending that said Act was violative of certain constitutional guaranties.

The Act assailed places under the supervision and regulation of the Railroad Commission of Texas the contract carrier as well as the common carrier. It gives that Commission the right and authority of control and supervision over the business and operations of contract carriers by providing;

(a) That no person shall thereafter operate as a contract carrier unless he shall have received a permit from the Railroad Commission, and that such permit shall not be issued until the applicant shall have in all things complied with the requirements of the Act;

(b) That the permit shall be issued only after the Commission has determined that the proposed operation of any such contract carrier will not impair the efficient public service of a common carrier then adequately serving the same territory.

(c) That it is the duty of the Railroad Commission to prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service;

(d) That it is the duty of the Commission to require such contract carriers to keep a set of accounts strictly in accordance with such classification of accounts and rules as may be prescribed by the Commission, and to file reports and such other data as the Commission may deem necessary.

Appellants contend that the aforementioned provisions of said Act, as applied to them, deprive them of their property without due process of law and deny to them the

equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

The case was tried on application for permanent injunction before a statutory three-judge court on the 8th day of June, A. D. 1932. The Court, one member dissenting, overruled the contention of appellants and denied in all things the application for permanent injunction. From that action of the majority of the Court, this appeal is being prosecuted.

II.

The Court found as a fact that appellants, and each of them, are engaged in the business of transporting property for hire by motor truck over the highways of the State of Texas as contract carriers. The Court further found that pursuant to the provisions of House Bill 335, the Railroad Commission of Texas promulgated minimum rates to be charged and received by contract carriers, and that these rates so prescribed as a minimum are higher than and in excess of the rates and charges fixed by the contract between appellants and their customers.

Appellants allege that the enforcement of said House Bill 335 will bring about a complete destruction of their respective said businesses as contract carriers. They instituted and brought this action not only for themselves, but also on behalf of all contract carriers in the State of Texas similarly situated. As respects these contract carriers not mentioned by name, the action is in the nature of a class suit.

The attack made upon the validity of this Act in this case has left the business of transportation by truck over the highways of the State of Texas as a contract carrier, and the regulation thereof, in a somewhat uncertain and unsettled state. It is both very important and highly desirous from the standpoint of appellants and appellees alike, that this unsettled state and its attendant problems be placed at rest. Appellants, on the one hand, have

valuable interests at stake and are threatened with the loss of same. Appellees, on the other hand, have found it very difficult to successfully enforce said Act because of said unsettled state. In this connection, appellants and appellees desire to show unto the Court that this condition of doubt and confusion has greatly harmed appellants in the conduct of their business and has likewise greatly hampered and retarded appellees in the enforcement of said Act, and that this unsatisfactory condition will continue to exist until this Honorable Court has adjudicated and placed its construction upon the asserted unconstitutional features of said Act.

III.

Appellants and appellees agree that the facts and circumstances in this case justify an advancement of the cause upon the calendar of this Court and an assignment for hearing at an early date.

WHEREFORE, appellants and appellees pray that the case be advanced upon the calendar and assigned for hearing at an early date.

Respectfully submitted,

FULBRIGHT, CROOKER & FREEMAN,
Attorneys of Record for Complainant,

J. H. STEPHENSON, *and Complainant-intervenors,* W. S. FINNEGAN, P. E. ARNETT, B. E. ITES, V. C. BILBO, J. T. CARROLL and A. S. ROBINSON.

FRANKLIN & BLANKENBECKER,
JAS. J. SHAW,
Attorneys of Record for Complainant-intervenor D. A. BEARD.

JAMES V. ALLRED, *Attorney General,*

ELBERT HOOPER, T. S. CHRISTOPHER, *Asst. Atty. Generals, Attorneys of Record for Respondents, Appellees herein.*

FILE COPY

SEP 14 1932

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 326.

J. H. STEPHENSON, ET AL., *Appellants*,

vs.

T. BINFORD, ET AL., *Appellees*.

STATEMENT OF BASIS OF JURISDICTION.

R. C. FULBRIGHT,
JOHN H. CROOKER,
W. B. BATES,
LEON JAWORSKI,
LON BLANKENBECKER,
Attorneys for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 326.

J. H. STEPHENSON, ET AL., *Appellants*,

vs.

T. BINFORD, ET AL., *Appellees*.

STATEMENT OF BASIS OF JURISDICTION.

May it Please the Court:

As a supplement to and in support of a joint motion of all parties in the above proceeding to advance the cause for early hearing before this Court, your petitioners desire to submit the following as a basis for the jurisdiction of your Honorable Court in this proceeding:

A. STATUTES.

Section 266 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, sec. 1, 43 Stat. 938). USCA Title 28, Section 380.

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, sec. 1, 43 Stat. 938).

B. DECREE.

The case was tried on application for permanent injunction before a statutory three-judge court. On the 8th day of June, A.D. 1932, the Court entered its decree (one member dissenting), denying in all things the application for permanent injunction. (Tr. of R. pp. 222, 223)* The application for appeal was filed on the 6th day of July, A.D. 1932, and the order of the Court allowing the appeal was entered July 6, 1932 (Tr. of R. pp. 241, 242).* Citation to respondents was duly issued and thereafter the Court enlarged the time for the docketing of this cause and the filing of the record with this Honorable Court until September 1st, 1932. (Tr. of R. p. 348.)* The case was docketed in the Supreme Court on August 30, 1932, being cause No. 326—upon the docket of this Court.

C. RULINGS.

This proceeding is an appeal from a decision of a statutory three-judge court, consisting of a United States Circuit Judge and two United States District Judges, convoked by the judge presiding over the District Court of the United States for the Southern District of Texas. This appeal is being prosecuted from the action of the majority of that Court in denying unto complainants the permanent injunction applied for to restrain the enforcement of House Bill 335, passed by the 42nd Legislature of Texas at its regular session in 1931, and published as Chapter 277, Page 480, Acts of Forty-second Legislature (Vernon Sayles Texas Civil Statutes, Art. 911b and Penal Code Article 1690b), and which Act became effective on August 22, A.D. 1931. Appellants here, who were complainants below, all contract carriers operating over the highways of the State of Texas, contended that certain provisions of said Act, as

*References can be made to the transcript of record forwarded to the Supreme Court by the Clerk of the District Court only, for the reason that it will be some time before the printed record is completed.

applied to them, deprived them of their property without due process of law and denied to them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. Complainants' attack was levelled at statutory provisions (contained in said Act) regulating the business and operations of contract carriers, by providing:

(a) That no person shall thereafter operate as a contract carrier unless he shall have received a permit from the Railroad Commission, and that such permit shall not be issued until the applicant shall have in all things complied with the requirements of the Act;

(b) That the permit shall be issued only after the Commission has determined that the proposed operation of any such contract carrier will not impair the efficient public service of a common carrier then adequately serving the same territory;

(c) That it is the duty of the Railroad Commission to supervise and regulate the transportation operations of contract carriers and to fix, prescribe, or approve the maximum or minimum, or maximum and minimum, rates, fares and charges of such contract carriers;

(d) That it is the duty of the Railroad Commission to prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service;

(e) That before any permit may be issued, the contract-carrier applicant must carry insurance to cover the cargo that will be transported by him as such contract carrier; and

(f) That it is the duty of the Commission to require such contract carriers to keep a set of accounts strictly in accordance with such classification of accounts and rules as may be prescribed by the Commission, and to file reports and such other data as the Commission may deem necessary.

The suit was instituted under the provisions of Section 266 of the Judicial Code as amended, Act of February 13, 1925 (c. 229, 43 Stat. 938).

D. CASES.

Interstate Busses Corporation vs. Blodgett, 48 Supreme Court 230, 276 U. S. 245, 72 L. ed. 551;

Smith vs. Wilson, 273 U. S. 388, 71 L. ed. 699, 47 Supreme Court Reporter 385;

Clark vs. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 Supreme Court Reporter 702;

Herkness vs. Irion, 49 Supreme Court Reporter 40, 278 U. S. 92, 73 L. ed. 198;

Michigan Public Utilities Commission vs. Duke, 266 U. S. 570;

Becker vs. Kuykendall, 267 U. S. 307;

Frost vs. Railroad Commission of California, 271 U. S. 583;

Packard vs. Banton, 264 U. S. 140, 68 L. ed. 596;

Smith vs. Cahoon, 283 U. S. 553, 75 L. ed. 1264.

Respectfully submitted,

R. C. Fulbright,
John H. Crooker,
W. B. Bates,
Leon Jaworski,
Lon Blankenbecker,
Attorneys for Appellants.

FILE COPY

Supreme Court of the United States.

OCTOBER TERM, 1932

IN EQUITY NO. 326.

J. H. STEPHENSON, ET AL.,
Appellants,

vs.

T. BINFORD, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF ON BEHALF OF D. A. BEARD, INTERVENER.

LARUE BROWN,
Boston, Mass.

L. E. BLANKENBECKER,
Franklin & Blankenbecker,
Houston, Texas.

Attorneys for D. A. BEARD,
Intervener.

HORACE P. MOULTON,
Of Counsel.

RECKLER PRESS, INC., BOSTON

INDEX.

	PAGE
Jurisdiction	1
Statement of Case	2
(a) The business of this intervener	2
(b) The statute complained of	3
The Contentions of this Intervener	4
Argument	5
The provisions of the Texas statute requiring this intervener to procure a permit from the Commission, fixing his minimum rates, and requiring him to furnish cargo insurance are regulations of his business which deprive him of his property without due process of law in violation of the Fourteenth Amendment	5
A. This intervener is a private carrier	5
B. These provisions are regulations of the business of this intervener and are not regulations with a view to conservation of the highways	6
C. The business of private carriage of this intervener cannot, in view of the Fourteenth Amendment, be subjected to such regulations	14
1. This is manifest from controlling decisions of this Court	14
2. The attempt of the appellees to distinguish these decisions is unsound	18
3. The business of this intervener is not "affected with a public interest"	22
4. The regulations imposed upon the business of this intervener cannot be sustained as conditions precedent to the privilege of using the highways	35
Conclusion	38

TABLE OF AUTHORITIES.

CASES CITED.

PAGE

Adkins v. Children's Hospital, 261 U. S. 525.....12, 25, 34
Barney v. Board of R. R. Commrs., U. S. Daily, July 7, 1932, p. 854.....10, 20
Barrett v. New York, 232 U. S. 14..... 13
Block v. Hirsh, 256 U. S. 135.....12, 24
Budd v. New York, 143 U. S. 517..... 24
Buck v. Kuykendall, 267 U. S. 307.....9, 19
Cobb v. Department of Public Works, 60 F. (2d) 63.... 13
Continental Baking Co. v. Woodring, 286 U. S. 352.....6, 18
Continental Baking Co. v. Woodring, 55 F. (2d) 347.... 13
Co-ordination of Motor Transportation, 182 I. C. C. 263 32
Fairmont Creamery Co. v. Minnesota, 274 U. S. 1.....12, 34
Frost v. Railroad Comm., 271 U. S. 583 5, 14, 15, 28, 31, 32, 35, 37
German Alliance Ins. Co. v. Lewis, 233 U. S. 389.....12, 24
Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U. S. 335 6
Ingate v. Christie, 3 Car. & K. 61..... 5
Louis v. Boynton, 53 F. (2d) 471..... 13
Michigan Public Utilities Comm. v. Duke, 266 U. S. 570 5, 14, 24, 28
Munn v. Illinois, 94 U. S. 113..... 24
New State Ice Co. v. Liebmann, 285 U. S. 262 4, 10, 25, 28, 32, 34
Producers' Transportation Co. v. Railroad Comm., 251 U. S. 228.....12, 24
Red Ball Transit Co. v. Marshall, 8 F. (2d) 635..... 13
Ribnik v. McBride, 277 U. S. 350.....12, 23

PAGE

Sage v. Baldwin, 55 F. (2d) 958 7
Smith v. Cahoon, 283 U. S. 553 ..... 4, 5, 6, 14, 16, 28
Sproles v. Binford, 286 U. S. 374 ..... 6, 18
Sprout v. South Bend, 277 U. S. 163 13
Stafford v. Wallace, 258 U. S. 495 24
Tagg Bros. & Moorhead v. United States, 280 U. S. 420. 24
Terminal Cab Co. v. Kutz, 241 U. S. 252 5
Texoma Natural Gas Co. v. Railroad Comm., 59 F. (2d) 750 24
Tyson v. Banton, 273 U. S. 418 ..... 12, 23, 28, 34
Weaver v. Public Service Comm., 40 Wyo. 462, 278 Pac. 542 36
Williams v. Standard Oil Co., 278 U. S. 235 ..... 12, 23, 32, 34, 37
Wilson v. New, 243 U. S. 332 ..... 24, 34
Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 ..... 24, 28, 34, 35, 37

STATUTES.

Statute of California, 1917, p. 330 15
Florida Laws, 1929, c. 13, 700 16
Michigan Public Acts, 1923, No. 209 14
Montana Laws, 1931, c. 184 20
Oklahoma Laws, 1925, c. 147 26
Texas General Laws (Forty-Second Legislature, Regular Session, 1931), c. 277 ..... 1, 3
28 U. S. C. Section 380 1

PERIODICALS.

Brown and Scott, *Regulation of the Contract Motor Carrier under the Constitution,* 44 Harv. L. Rev. 530. 11

PAGE

Kelly, *The Problem of Motor Vehicle Regulation*..... 25

Robinson, *The Public Utility Concept in American Law*, 41 Harv. L. Rev. 277..... 24

BRIEFS.

Brief for Appellant in Michigan Public Utilities Comm. v. Duke 22

Brief for Appellant in Smith v. Cahoon..... 22

Supreme Court of the United States.

OCTOBER TERM, 1932.

J. H. STEPHENSON, ET AL., APPELLANTS
vs.
T. BINFORD, ET AL., APPELLEES.
} In Equity No. 326.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF ON BEHALF OF D. A. BEARD, INTERVENER.

JURISDICTION.

This suit in equity to enjoin and restrain the enforcement of Texas General Laws (Forty-Second Legislature, Regular Session, 1931) c. 277 upon the ground that certain provisions thereof contravene the Fourteenth Amendment to the Federal Constitution was brought in the District Court of the United States for the Southern District of Texas.

The bill of complaint was filed on August 20, 1931. (R. 2.) This intervener, D. A. Beard, filed his intervention on August 25, 1931. (R. 47.) After hearing before a statutory court, organized pursuant to 28 U.S.C. Section 380, the temporary injunction prayed for in the bill was denied, October 26, 1931. The opinion of the Court is reported in 53 F. (2d) 509. (R. 129.)

A final hearing of this cause was then had and a final decree denying a permanent injunction was rendered on June 8, 1932. (R. 180-81.) The opinion of the Court, as yet not reported, is found on page 180 of the Record.

By an order filed July 6, 1932, an appeal to this Court was allowed. (R. 194.) The cause was advanced by this Court and set for argument on November 14, 1932.

STATEMENT OF CASE.

(A) THE BUSINESS OF THIS INTERVENER.

This intervener, D. A. Beard, is engaged under an oral agreement entered into April 15, 1931 with the Peden Company, a wholesale jobber and distributor of hardware, to transport its commodities from its principal place of business in Houston to its warehouses in San Antonio, Beaumont, Abilene, and elsewhere in Texas. (R. 172, 198.) The intervener's compensation is determined by agreement with the Peden Company before or after each particular trip or haul. (R. 198, 199.) The intervener does not operate upon a regular route, nor does he make regular trips. He hauls when and where the company directs. (R. 199.) He handles only about one-third of the transportation for the Peden Company; the remainder goes by rail. (R. 198.)

This intervener does not solicit the freight of others than the Peden Company or otherwise hold himself out to carry for the public at large. (R. 200.)

He does not carry cargo or merchandise insurance, not being called upon to do so by his agreement with the Peden Company. (R. 200.)

The rates agreed upon between this intervener and the Peden Company are lower than those charged by competing

common carriers for substantially the same service. (R. 198-199, 201-03.)

This intervener has invested approximately eighteen thousand dollars in his equipment, the principal part of which will be lost if he is not permitted to transport for the Peden Company under the existing agreement. (R. 199-200.)

(B) THE STATUTE COMPLAINED OF.

The statute in question, Texas General Laws (Forty-Second Legislature, Regular Session, 1931) c. 277 is printed *in extenso* in the Record, pages 9 to 32. It provides for the regulation of carriers of freight for hire upon the highways, imposing regulations upon the businesses of both common and contract carriers. Contract or private carriers are required by Section 6 to obtain permits before engaging in business. Permits are to be granted or refused by the Commission upon considerations relating to the effect of additional competition upon existing common carriers. These considerations are more fully set forth and dealt with hereinafter. This is likewise true of the provisions of Section 6aa, providing that the minimum rates of private carriers operating in competition with common carriers shall be fixed by the Commission, but shall not be less than those prescribed for such common carriers. Section 13 requires that, as a condition precedent to operation on the highways, both common and private carriers must furnish insurance or bonds conditioned upon loss or damage to goods carried by such carriers while in transit.

The court below has held that these provisions of this statute are constitutional as applied to this intervener.

THE CONTENTIONS OF THIS INTERVENER.

This intervener does not propose here to argue all the propositions set forth in the appellants' Statement of Points. (R. 289-92.) In dealing only with certain of these points, this intervener does not intend to suggest any doubt as to the soundness of the points which are not referred to herein but are argued by other counsel in whose contentions this intervener joins.

This intervener is only concerned with those provisions of the statute which attempt to regulate his business relations with the Peden Company. He makes no contentions with regard to the portions of the statute which may fairly be considered as reasonable safeguards of the highways and their use.

More specifically, this intervener contends that the provisions of Sections 6 and 6aa, and those of Section 13, so far as cargo insurance is required of him by that section, are unconstitutional as applied to his business. In this he relies primarily upon the decisions of this court in *Smith* v. *Cahoon*, 283 U. S. 553, and *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, and upon the authorities upon which those recent decisions are predicated.

ARGUMENT.

THE PROVISIONS OF THE TEXAS STATUTE REQUIRING THIS INTERVENER TO PROCURE A PERMIT FROM THE COMMISSION, FIXING HIS MINIMUM RATES, AND REQUIRING HIM TO FURNISH CARGO INSURANCE ARE REGULATIONS OF HIS BUSINESS WHICH DEPRIVE HIM OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. This Intervener is a Private Carrier.

He is engaged under a single oral contract to transport by motor truck commodities of the Peden Company, when and where the Peden Company directs. His compensation is determined by agreement in each particular instance, either before or after his services are rendered. He carries for no other person or corporation, but solely for the Peden Company to which he devotes his entire equipment. He solicits no other business. In short, this intervener does not hold himself out to carry the goods of all, but confines his operations to the fulfillment of his contract with the Peden Company.

As far back as *Ingate* v. *Christie,* 3 Car. & K. 61 (1850) it was said:

> "The criterion is, whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract."

Judged by this test, and by the decisions of this court in *Michigan Public Utilities Comm.* v. *Duke,* 266 U. S. 570, *Frost* v. *Railroad Comm.,* 271 U. S. 583, *Terminal Cab Co.* v. *Kutz,* 241 U. S. 252, and *Smith* v. *Cahoon,* 283 U. S. 553, it seems beyond dispute that this intervener, engaged exclusively in

transporting under a single contract, occupies the status of a purely private carrier.

The sole issue of his appeal is whether his business as such may be subjected to the regulations which the Texas statute imposes.

B. These Provisions are Regulations of the Business of this Intervener and are not Regulations with a View to Conservation of the Highways.

We are not here concerned with the power of the state to regulate traffic on the highways in the interest of preserving their condition and the safety of the traveling public. The power of the state to impose reasonable regulations upon the use of the highways is not questioned. *Cf. Sproles* v. *Binford,* 286 U. S. 374. This intervener does not complain of the provisions of the statute attributable solely to this power, as, for example, Section 6 cc which restricts the hours of operation by truck drivers, and Section 13, so far as it requires the giving of bond to secure the public against loss from personal injuries. Provisions having this power as their source, it is agreed, may appropriately be applied to both common and contract carriers. See *Smith* v. *Cahoon,* 283 U. S. 553, 563; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 368-69; *Hodge Drive-It-Yourself Co.* v. *Cincinnati,* 284 U. S. 335, 337.

But the Texas statute is primarily designed to regulate and restrict the businesses of common and private carriage. By this enactment the state asserts power to impose competitive restrictions upon the intervener in conducting his business as a private carrier. As the court below points out, these restrictions are not imposed "upon the pretext of regulating highways." (53 F. (2d) at 513, R. 134). They are sought to be supported by the asserted power for economic reasons to regulate the business of intervener's private undertaking. They constitute burdens and impose

duties peculiar to public utilities generally. Of them the intervener complains.

A classification of the provisions of this statute according to their source in one or the other of these powers is contained in *Sage* v. *Baldwin,* 55 F. (2d) 968. It was there held that the provisions of this statute regulating the business of private carriage could not constitutionally be applied to contract carriers engaged in interstate commerce.

This case was decided by a statutory court for the Northern District of Texas, Dallas Division. Circuit Judge Hutcheson, who wrote the opinion in the instant case, was a member of the court and concurred in the decision. The last paragraph of the opinion reads (55 F. (2d) at 971):

> "Preserving, therefore, the rights of the state and the rights of the nation, the respondents will be enjoined from interfering with the operations of the complainants, or from arresting them for alleged violations of this law, so far as any rates may be concerned, or so far as any bond securing any shipper may be concerned, or so far as any certificate of public convenience or necessity is concerned, or so far as the impairment of any other service, either contract or common carrier is concerned, or so far as the making of any reports or the keeping of classification of accounts, or in any wise seeking to effect the relationship of the complainant, or any of them, to shippers, either within or without the state; the order making it clear that nothing in this restraint shall in any manner limit the power of respondents in the exercise of the police power of the state relating to traffic safety; highway protection; competent drivers, who shall be licensed; the hours of drivers; the giving of bond to secure the public against loss from personal injuries; the inspection and approval or disapproval of the equipment; the display of the license tag; the equipment itself; classification of the highways of the state as to congestion; and their character and ability to withstand use—all as provided for as traffic safety provisions in the act."

The specific provisions of the statute which the intervener contends cannot constitutionally be applied to him because they are regulations of his private business are:

(1) The permit requirements of Section 6.

By this section it is provided that no contract carrier shall operate "until it shall have received a permit from the Commission to engage in such business." (Section 6 (a)) It is further provided that no permit shall be granted "if the Commission shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory." (Section 6 (c)) No such permit shall be issued "until the applicant shall have in all things complied with the requirements" of the statute. (Section 6 (a))

It is perhaps relevant, in view of argument predicated upon the fact that the statute deals with common and contract carriers separately, briefly to compare the permit requirements with the provisions for certification of common carriers. By section 9 it is provided that a certificate of public convenience and necessity shall not be issued to a common carrier if the Commission determines "that the service rendered by existing transportation facilities or agencies is reasonably adequate, or that public convenience would not be promoted by granting of said application, and the operation of motor vehicles on the public highways designated, or that such highways are not in such state of repair, or are already subject to such use as would not permit of the use sought to be made by the applicant without unreasonable interference with the use of such highways by the general public for highway purposes. . . ."

It will be noted:

First, that the primary test in both sections is that of the adequacy or inadequacy of existing facilities;

Second, that, if other facilities are adequate, a certificate must be denied, while a permit may be granted only if, in the opinion of the Commission, the "proposed service" will not impair the "efficient public service" of certificated common carriers. There is no practical difference. Any proposed private carrier service, such as a contractual arrangement between even one substantial shipper and a private carrier, will tend to impair the service of the existing common carrier or carriers and thus tend to impair their efficiency. It is true that if the proposed contract is to supercede one between the shipper and another private carrier, the efficiency of authorized common carriers will not be impaired in the slightest. This provision, therefore, protects the common carrier from competition from private carriers, but does not afford the private carrier protection from like competition. The common carrier thus becomes the sole beneficiary of the permit requirements, which combine all the restrictions upon the business of private carriage which attach to certification without the compensating advantages of limiting competition;

Third, that while the Commission is to consider highway and traffic conditions before granting certificates to common carriers, no such considerations are prescribed relative to the issuance of permits to private carriers. In the latter case, only *competitive* conditions are to be considered.

It is evident upon analysis that the permit requirement of section 6 is not designed as a highway protective measure or highway traffic regulation. It was not enacted, as the lower Court pointed out, "upon the pretext of highway regulation." (53 F. (2d) at 513; R. 134.) What was said of certification of common carriers in *Buck* v. *Kuykendall,* 267 U. S. 307, is equally applicable here (pp. 315-16):

> "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the pro-

> hibition of competition. It determines not the manner of use, but the persons by whom the highway may be used."

However they may be described, the provisions of Section 6 are solely directed towards restriction of the business of the private carrier. They are such restrictions as may constitutionally be imposed upon public carriers or public utilities but upon no others. *New State Ice Co.* v. *Liebmann,* 285 U. S. 262; *Barney* v. *Board of R. R. Commrs.,* (decided June 25, 1932, Sup. Ct. Montana, see U. S. Daily, July 7, 1932, p. 854, not yet reported).

(2) Rate regulation provided for in Section 6aa.

This section reads as follows:

> "The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers *in competition with common carriers* over the highways of this State and the Commission *shall* prescribe *minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.*" [1]

Two points should here be noted. First, the Commission is vested with authority to regulate the rates of contract carriers only when such carriers are operating in competition with common carriers. Precisely what constitutes "competition" within the contemplation of this section is not altogether clear. Presumably, however, this intervener is operating in "competition" with every common carrier, whether by truck or by rail, whose facilities are reasonably adapted to carry the commodities of the Peden Company which are now being carried by the intervener under private

[1] The italics are ours unless the contrary is indicated.

contract. Here, as in the permit requirements of Section 6, the single aim is the restriction of competition between common and private carriers, not that between private carriers.

Second, it is mandatory upon the Commission to prescribe minimum rates which shall be at least equal to those prescribed for competing common carriers. Thus the rates of private carriers are to be fixed, not on any basis of the cost of the service rendered or of the fair value of the service to the shipper nor with regard to a fair return to the private carrier upon his investment, but solely with reference to the rates of his competitors. The Commission is not, however, authorized to fix maximum or exact rates although it has that power over the rates of common carriers. (Section 4 (a))

Judged by its necessary effect, the preconceived aim of the permit requirement of Section 6 is that no private carrier shall contract with any shipper to whom "adequate" common carrier facilities are available. When to this is added this highly artificial rate fixing provision by which certificated common carriers are placed in a peculiarly advantageous competitive position as against such private carriers as may be able to procure permits, the outcome can only be that the private carrier will ultimately be regulated out of existence. His rates are to be fixed by the necessarily general consideration which determines the charges of those who serve all who come. He may no longer save to himself and his customer the economies permitted by the specific situation. He must meet competition from powerful units deprived of his own weapons of competition.

No extended argument is required to demonstrate that the regulation of rates is purely a regulation of business, finding no semblance of authority in the power to legislate for the preservation of the highways or safety in their use. See Brown & Scott, *Regulation of the Contract Motor Carrier Under the Constitution,* 44 Harv. L. Rev. 530, 550-58.

It is, of course, clear that governmental rate regulation is an interference with the freedom of contract, which may be imposed upon common carriers or upon businesses which due to peculiar circumstances of devotion to public use, virtual monopoly or inequality of bargaining power between producer and consumer are affected by the public interest and have thus acquired the status of a public utility.

Williams v. *Standard Oil Co.*, 278 U. S. 235.
Ribnik v. *McBride*, 277 U. S. 350.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1.
Tyson v. *Banton*, 273 U. S. 418.
Adkins v. *Children's Hospital*, 261 U. S. 525.
Block v. *Hirsh*, 256 U. S. 135.
Producers' Transportation Co. v. *Railroad Comm.*, 251 U. S. 228, 230, 231.
German Alliance Insurance Co. v. *Lewis*, 233 U. S. 389.

The question therefore comes down to whether the business of the intervener, shown above to be a private business under familiar definition, can by legislative fiat be transformed into a public business and as such made subject to regulation of this character.

(3) The cargo insurance requirements of Section 13.

In this section common and private carriers are treated indiscriminately. So far as it requires bonds or insurance to secure the public against loss from personal injuries, no question is raised. But to the extent that this section requires so-called "cargo" insurance to secure the shipper from loss of or damage to his property in transit, it imposes a requirement which bears no relation to public safety or order in the use of motor vehicles upon the highways, but attempts to invade the field of matters which are properly

incident to the private contractual relationship between shipper and private carrier. It prevents the shipper from saving himself the cost of such insurance if he prefers himself to take the risk or to rely upon the financial responsibility to the carrier. It is clearly an unwarranted regulation of the private business both of the intervener and of his customer.

Louis v. *Boynton*, 53 F. (2d) 471.
Continental Baking Co. v. *Woodring*, 55 F. (2d) 347, affirmed 286 U. S. 352.
Sprout v. *South Bend*, 277 U. S. 163.
Barrett v. *New York*, 232 U. S. 14.
Red Ball Transit Co. v. *Marshall*, 8 F. (2d) 635, appeal dismissed without opinion 273 U. S. 782.
Cobb v. *Department of Public Works*, 60 F. (2d) 631.

It has occasionally been held, in inferior courts, that similar insurance requirements are to be construed, for constitutional reasons, not to require cargo insurance of contract carriers.

Louis v. *Boynton*, 53 F. (2d) 471, 473.
Continental Baking Co. v. *Woodring*, 55 F. (2d) 347, 357.

Whatever may have been the justification for the interpretation in other instances, it is submitted that such is not an admissible construction of the present section. It is provided that "before any permit or certificate of public convenience and necessity may be issued to any motor carrier" such motor carrier shall file bonds and insurance policies which "shall provide that the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the

motor carriers so filing said insurance policies and bonds, based on claims for loss or damages from personal injury or loss of, or injury to, property occurring during the term of said bonds and policies arising out of the actual operation of such motor carriers. . . ." It is manifest that no distinction is made between common and contract carriers, and that the scope of this provision includes the requirement of cargo insurance of both common and private carriers. Any doubt which may exist is dispelled by the proviso "that the Commission shall not require insurance covering loss of or damage to cargo in amount excessive for the class of service to be rendered by any motor carrier."

C. The Business of Private Carriage of this Intervener cannot, in view of the Fourteenth Amendment, be subjected to such regulations.

1. This is manifest from controlling decisions of this Court.

This intervener contends that the foregoing restrictions can not be imposed upon his business consistently with the due process clause of the Fourteenth Amendment. This, it is submitted, has been consistently held by this Court in the controlling decisions of *Michigan Public Utilities Comm.* v. *Duke,* 266 U. S. 570, *Frost* v. *Railroad Comm.,* 271 U. S. 583, and particularly *Smith* v. *Cahoon,* 283 U. S. 553.

In the *Duke* case, all carriers for hire, including private carriers, were declared to be common carriers and required to procure permits issued upon considerations very similar to those provided in Section 6 of the Texas statute. The Michigan statute there in controversy (Michigan Public Acts, 1923 No. 209) also provided for rate regulation and cargo insurance. It was held that the Michigan statute, as applied to a private carrier engaged in interstate commerce, not only constituted an unlawful interference with

interstate commerce, but also was violative of the Fourteenth Amendment. Mr. Justice Butler there said (266 U. S. at 577-78):

> "Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment."

Frost v. *Railroad Comm.*, 271 U. S. 583, represented an extension of the fundamental principle announced in the *Duke* case. The California statute in question (Statutes of California, 1917, p. 330) required certificates of convenience and necessity of both common and contract carriers and the regulation of the rates of both. While there was no express declaration that contract carriers were henceforth to be deemed common carriers, the California Supreme Court, in construing the statute, held that this was its effect, and attempted to justify its decision upon the theory that the private carriers used the highways as a privilege which might be conditioned upon the consent by private carriers to be regulated under the provisions of the California statute. This court held that the requirement of a certificate of convenience and necessity was a regulation of the business of private carriage and that the plaintiff could not validly be subjected to this and the other duties and burdens imposed by the Act upon common carriers either directly or as a condition to the granting of the privilege of using the highways, if in fact such use was by virtue of a privilege. It is important in view of the contention that the Texas statute may be upheld because it is a regulation of competition afforded by private carriers to common carriers, which in fact is its purpose and will be its result, to note the lan-

guage by which the California statute, declared invalid in the *Frost* case, was characterized by this Court (271 U. S. at 591-92):

> "It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. *Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions.* Protection or conservation of the highways is not involved. This, in effect, is the view of the court below plainly expressed."

Smith v. *Cahoon*, 283 U. S. 553, arose upon facts substantially similar to those in the *Frost* case. The Florida statute there involved (Florida Laws, 1929, c. 13,700) required certificates of both common and private carriers, provided for the regulation of their rates and called for cargo insurance for both types of carriers. Unlike the *Frost* case, however, the Supreme Court of Florida specifically held that "the statute does not require private carriers to become common carriers." (283 U. S. at 560) While the case arose upon appeal from denial of a writ of habeas corpus sought in behalf of a purely private carrier who was arrested upon the charge of having operated without first having obtained a certificate of public convenience and necessity and without having paid the tax required by the Florida statute, this Court in its opinion did not confine itself strictly to the question as to whether a certificate or payment of the tax might be required of the appellant private carrier but dealt with the statute as a whole. This Court condemned the statute in the following language (283 U. S. at 562-63):

> "The statute on its face makes no distinction between common carriers and a private carrier such as the appellant. It applies, without any stated exception, to every auto transportation company within the statutory

definition, and this admittedly included the appellant. It not only required an application for a certificate of public convenience and necessity but that this should be accompanied by a schedule of tariffs, and no such certificate was to be valid without the giving of a bond by the applicant for the protection both of the public against injuries and of the persons or property carried. The state commission was explicitly vested with authority to supervise "every" auto transportation company that was embraced within the definition, to fix or approve its rates and charges, to regulate its service, to prescribe its method of keeping accounts which should set up adequate depreciation charges, and generally to make rules governing its operations. Schedules of rates of "every such auto transportation company" were to be open to the public and all alterations in tariffs were to be subject to the commission's control. On the face of the statute, the scheme was obviously one for the supervision and control of those carriers which, by reason of the nature of their undertaking or business, were subject to regulation by public authority in relation to rates and service. *No separate scheme of regulation can be discerned in the terms of the act with respect to those considerations of safety and proper operation affecting the use of highways which may appropriately relate to private carriers as well as to common carriers.* All carriers within the act, whether public or private, are put by the terms of the statute upon precisely the same footing. All must obtain certificates of public convenience and necessity upon like application and conditions. It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the state. See Michigan Pub. Utilities Commission v. Duke, 266 U. S. 570, 576-578, Frost & F. Trucking Co. v. Railroad Commission, 271 U. S. 583, 592."

The italicized sentence brings out in bold relief the distinction which has already been expressed in the *Frost* case.

(271 U. S. 583, 591.) The business of a purely private carrier is a private undertaking, and as such is not subject to regulation or interference by restrictions as to who may enter the business and how much shall be charged. These, and the requirement of cargo insurance, are to be left solely to private contract between shipper and the carrier.

On the other hand, regulations such as those relating to safety, weight, speed, equipment and hours of labor, which may fairly be said to be designed primarily for the promotion of safety upon the highways and the preservation of the highways may appropriately be applied to both common and contract carriers.

This distinction between permissible and prohibited regulation was reiterated by this court in *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, where the Court said (pp. 368-69):

> "The distinction made by the statute between public and private carriers with respect to the obtaining of certificates of public convenience and necessity, and as to rates and charges, indicates the intention to keep separate the special responsibilities of public carriers from the more limited but still important duties which are owing as well by private carriers, in protecting the public highways from misuse and in insuring safe traffic conditions, and there is no reason to conclude that the authority given to the commission will not be viewed and exercised accordingly."
>
> See also *Sproles* v. *Binford,* 286 U. S. 374, 394.

2. The attempt of the appellees to distinguish these decisions is unsound.

The appellees seek to distinguish the present case from *Smith* v. *Cahoon* by the fact that in the *Cahoon* case both common and contract carriers were dealt with under the single all-inclusive Florida statute without separation of the requirements applicable to common carriers from those im-

posed upon private carriers. In the Texas statute, it is said, contract carriers are dealt with separately and are subjected to "a separate scheme of regulation"; for this reason it is contended that the decision in the *Cahoon* case is not applicable. The mere fact of the physical separation of the provisions regulating the one and the other type of carriers is obviously without relevance. If the legislature of Texas had passed two statutes, one dealing with regulation of common carriers and one with that of contract carriers, identical save for the use of the terms "common carrier" in the one and "contract carrier" in the other, it could hardly be contended that the force of the *Cahoon* case and its predecessors would thus be avoided. Manifestly the fact that contract carriers were included within the term "common carrier" in the *Duke* case and within the all-inclusive terms "transportation company" in the *Frost* case and "auto transportation company" in the *Cahoon* case is not determinative. It is immaterial what terms the legislature uses; the determining factor is the nature of the regulations and restrictions which the statute places upon private carriers, by whatever name they are called.

As this Court has clearly pointed out in the *Cahoon* case, if the separate scheme of regulation as applied to private carriers deals primarily with the manner of the use of the highways and with questions of safety and operation thereupon, it is within the power of the state. But if, as was stated in *Buck* v. *Kuykendall*, 267 U. S. 307, 316, "its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition," and if it results in interference with the conduct by this intervener of his business as a private carrier and the fulfillment of his contract with the Peden Company, it is beyond the power of the state since it deprives the intervener of his property without due process of law in contravention of the Fourteenth Amendment.

This conclusion from the settled decisions of this Court has recently been drawn by the Montana Supreme Court in *Barney* v. *Board of Railroad Commissioners,* decided June 25, 1932, U. S. Daily, July 7, 1932, 854, (not yet officially reported). The Montana law there in controversy (Montana Laws, 1931, c. 184) provided for separate classifications, Classes A and B being common carriers and Class C including only contract carriers. The rates of Classes A and B, but not those of Class C, were subjected to regulation by the Board. The Board also was given broad powers to make rules and regulations with regard to schedules and services, but it was specifically provided that in making such rules or regulations the Board "shall have due regard for the differences existing between Class A, Class B and Class C motor carriers as herein defined." All three classes of carriers were required, but in separate sections of the statute, to procure certificates of public convenience and necessity. The considerations prescribed for the Board in granting certificates were identical in each section. The Board was directed to give "reasonable consideration to the transportation service being furnished or that will be furnished by any railroad, or other existing transportation agency, and shall give due consideration to the likelihood of the proposed service being permanent and to continue through twelve (12) months of the year and the effect which such proposed transportation service may have upon other forms of transportation service which are essential and indispensible to the community and would be affected by such proposed transportation service or that might be affected thereby." The plaintiff, a private carrier, applied for a certificate which was denied on the ground that public convenience and necessity did not require the service he proposed. The plaintiff then brought suit to restrain the enforcement of the act as against him. The defendants filed a general demurrer which was overruled. Upon appeal, it was

held that the certificate requirement constituted a regulation of the business of the plaintiff and was therefore invalid by virtue of the numerous decisions of this Court. The Court said,

> "The requirement that a private carrier must obtain a certificate of public convenience and necessity before being permitted to use the public highways of the State, not being a regulation of the use of highways but a prohibition of competition and, therefore, a measure designed to regulate the business of those using the highways, can not stand."

Upon this analysis, it is manifest that the provisions of the Texas statute of which this intervener complains are not validated because they are contained in separate sections of the statute or because the precise manner of the regulation under these sections differs somewhat from that applied to common carriage. The essential fact is that they are attempts to regulate the business of private carriage and to interfere with this intervener in his performance of his purely private undertaking. For these reasons, arguments predicated upon the separate treatment of common and of private carriers in this Texas statute can not prevail.

The Court's attention is particularly called to the dissenting opinion of District Judge Kennerly, in which he said (53 F. (2d) at 516; R. 142):

> "In what is said respecting those regulations contained in the Legislative Act (House Bill 335), which concern traffic safety and highway protection, I fully concur. McLeaish v. Binford (D.C.) 52 F. (2d) 737; Sproles v. Binford (D.C.) 52 F. (2d) 730; and McLeaish v. Binford (D.C.) 52 F. (2d) 151, and cases there cited.
>
> I cannot, however, see my way clear to concur in the disposition made of the questions raised and presented by complainant and interveners (who are I think clearly contract carriers or private carriers, and not common carriers) respecting those regulations in the act which in

> no real sense concern traffic safety and highway protection, but are in fact a regulation of the business, and a restriction of the right of contract, of the contract carriers. I think there is no material difference in legal effect between the Michigan, Washington, California, and Florida Acts and this act, and that Michigan v. Duke, 266 U.S. 571, 45 S. Ct. 191, 69 L. Ed. 445, 36 A.L.R. 1105; Buck v. Kuykendall, 267 U.S. 314, 45 S. Ct. 324, 69 L. Ed. 623, 38 A.L.R. 286; Frost v. Commission, 271 U.S. 583, 46 S. St. 605, 70 L. Ed. 1101, 47 A.L.R. 457; and Smith v. Cahoon, 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264, are controlling. I think the temporary injunction prayed for, restraining the enforcement of the last-mentioned regulations, should be granted."

It is submitted that in view of the settled decisions of this Court the decision of the majority of the Court below is in error, and that the view of District Judge Kennerly in his dissenting opinion is correct.

3. The business of this intervener is not "affected with a public interest."

It has been pointed out that the permit requirements and rate-fixing provision of the Texas statute are business regulations such as may only be imposed upon public utilities or quasi-public businesses. It has also been demonstrated that the Court has from the *Duke* and *Cahoon* cases consistently held that such regulations may not be imposed upon purely private carriers such as this intervener. Since it is only upon the ground that the business of private carriage is one "affected with a public interest" that such regulations could have been sustained, the issue of the public status of private carriage was in those cases before this Court. In *Michigan Public Utilities Comm.* v. *Duke* and in *Smith* v. *Cahoon,* this issue was specifically briefed and argued before this Court. See Brief for Appellant in *Michigan Public Utilities Comm.* v. *Duke,* pp. 21-25, and Brief for Appellant in *Smith* v.

Cahoon, pp. 28-32. The necessary conclusion from these decisions is that the business of private carriage is not one "affected with a public interest."

Nevertheless the appellees ask this court to declare that the business of private carriage is so clothed. Their contention, if acceded to, would result not only in disregard of what the Court has determined but in a departure from the guiding principles by which this Court has pricked out the line between those businesses which, consistently with the due process clause, may be subjected to regulation, and those which may not. The peculiar economic conditions which have been found to prevail in the businesses determined by this Court to be "affected with a public interest," and which have justified interference with the continuance of those businesses under the normal conditions of free contract are totally absent from the business of private carriage engaged in by this intervener.

One test of public character is that of devotion to a public use, which was applied by this court in *Tyson* v. *Banton,* 273 U. S. 418, *Ribnik* v. *McBride,* 277 U. S. 350 and *Williams* v. *Standard Oil Co.,* 278 U. S. 235. In the first case Mr. Justice Sutherland for the majority said (273 U. S. at 433-34):

> "The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, . . . that it shall be devoted to 'a public use'. Stated in another form, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public."[1]

It is clear from the facts appearing in the record relative to the business of this intervener that he does not answer to this test. He is a purely private carrier devoting all his

[1] *Italics those of Mr. Justice Sutherland.*

facilities under a single contract to a single corporation; he carries for no one else. He falls squarely within the language of Mr. Justice Butler in *Michigan Public Utilities Comm.* v. *Duke*, 266 U. S. 570, 576:

> "The plaintiff is a private carrier. . . . He does not undertake to carry for the public and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others."

See also *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522.
Producers' Transportation Co. v. *Railroad Comm.*, 251 U. S. 228.
Texoma Natural Gas Co. v. *Railroad Comm.*, 59 F. (2d) 750.
Robinson, *The Public Utility Concept in American Law*, 41 Harv. L. Rev. 277, 293-303.

The familiar criterion of virtual monopoly is also inapplicable. The private carrier in Texas enjoys no peculiarly advantageous location which permits him monopolistic dictation of rates or service to the public detriment. *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Stafford* v. *Wallace*, 253 U. S. 495. Rate competition has not been eliminated by agreement of private carriers among themselves; no concerted action exists among them which obstructs the function of competitive forces and renders it "illusory to speak of a liberty of contract." *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420. No major temporary emergency has lodged in this intervener and other private carriers the economic power to exact extortionate charges. *Block* v. *Hirsh*, 256 U. S. 135; *Wilson* v. *New*, 243 U. S. 332.

It is not contended by the appellees that any of those conditions exist; the record abounds with evidence that they

do not. The record conclusively shows that the business of carriage by truck for hire, whether in private or in common carriage, is highly competitive. This, in fact, seems the chief complaint. The provisions of Section 6aa for the regulation of *minimum* rates offer irrefutable evidence that the regulations imposed by the Texas statute do not spring from the necessity of protecting the public from monopolistic control. Nor can it be thought that this wholly arbitrary rate-fixing scheme is required or in any way calculated to protect private carriers who are whole-heartedly opposed to such regulation. Compare *Adkins* v. *Children's Hospital,* 261 U. S. 525.

There is, furthermore, one important consideration which prevents the acquisition of monopolistic control in truck transportation. That is the ease with which the shipper may acquire and operate a privately owned truck. For this reason, the shipper of moderate size, such as the Peden Company, is not dependent upon the private carrier, or any other type of transportation by truck or otherwise. This is borne out by recent statistics of the Bureau of Public Roads which indicate that 85.8% of all trucks throughout the country are privately owned and operated, while only 14.2% operate for hire. (See The Problem of Motor Vehicle Regulation with Special Attention to the Movement of Highway Traffic Across State Lines, reported by H. H. Kelly, Division of Highway Transport, Bureau of Public Roads, U. S. Department of Agriculture, p. 11.)

The analogy to the controlling influence of electrical refrigeration plants adverted to in *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, is striking. But the similarity between that and the present case does not end there. The *Liebmann* case, the latest decision of this Court in which the issue of "publicness" is involved, is based upon economic considerations substantially the same as those presented by the record now before the Court. If any prece-

dent is necessary beyond the direct authority of *Smith* v. *Cahoon*, the *Liebmann* case conclusively demonstrates that the business of private carriage of this intervener is not "affected with a public interest."

In the *Liebmann* case, the statute in question required a license as a condition precedent to engaging in the business of manufacture, sale and distribution of ice. (Oklahoma Laws 1925, c. 147, sec. 3.) By the terms of the statute, the licenses were to be granted or withheld upon consideration of the adequacy of existing facilities substantially similar to the permit requirements of Section 6 of the Texas act—considerations which customarily attach to certificates of public convenience and necessity. There were also provisions in the statute for the regulation of rates. (Oklahoma Laws, 1925, c. 147, sec. 5.) The appellee Liebmann was not actually engaged in manufacturing ice, but had purchased land and commenced erection of a plant for that purpose when a licensed manufacturer sought to enjoin him from engaging in the business without first obtaining a license. No distinction relevant to the constitutional issue involved exists between the procedure in the *Liebmann* case and in the present case, which arises upon appeal from the denial of an injunction restraining the enforcement of the Texas law sought by those whose businesses are threatened with regulation under the terms of that law.

The injunction sought in the *Liebmann* case was denied by the District Court (42 F. (2d) 918) and this decision was affirmed by the Circuit Court of Appeals (52 F. (2d) 349) where Circuit Judge Phillips said (p. 355):

> "It is our conclusion that, while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices. With such competition existing in the business, we seriously doubt that the manufacture of

ice is so affected with a public interest as to justify the fixing of prices at which the commodity shall be sold, and we hold that it is not so affected to the extent required to warrant the more serious invasion of the rights of the citizens by limiting the number of persons who may engage in such business in a given territory."

This Court, upon appeal, affirmed the decision of the Circuit Court of Appeals. The words of Mr. Justice Sutherland in the opinion in that case apply with equal force to the facts presented by the record in this case. He said (285 U. S. 262, 279):

"The control here asserted does not protect against monopoly, but tends to foster it. *The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.* . . . The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary."

The rate fixing and permit provisions of the Texas act fall squarely within the *ratio decidendi* of the *Liebmann* decision. The sole aim of those provisions is to foster and protect the monopoly of common carriers in the field of transportation by the exclusion of persons from engaging in the business of private carriage which has heretofore consistently been held by this court to be a purely private enterprise, and by the imposition of rate restrictions upon those who are permitted to engage in such business the sole design and effect of which are to obstruct the working of normal economic laws.

Turning from these controlling decisions to a consideration of the arguments upon which is predicated the attempt to sustain the regulation of the business of this intervener, and circumvent these decisions, passing note may be made

of the "Declaration of Policy" found in Section 22b. It is there declared that "the business of operating as a motor carrier of property for hire . . . is declared to be a business affected with the public interest." An examination of the reasons given discloses that most of them deal with traffic conditions upon the highways. As has been said, so far as the provisions of this statute are primarily and reasonably designed to remedy such conditions no complaint is made. If that be the basis for clothing intervener with the public interest, everyone who operates a motor vehicle for any purpose upon the highways is equally so clothed. No magic exists in such a legislative declaration; no such expression can, *ex proprio vigore*, conclude the question of constitutionality. *Tyson* v. *Banton*, 273 U. S. 418, 431. In so far as it is sought to strip the intervener's business of the protections of the Fourteenth Amendment by reason of this legislative pronouncement, it adds no weight to the other arguments advanced in an attempt to reach that result.

The very enactment of the statutes condemned in *Michigan Public Utilities Comm.* v. *Duke*, 266 U. S. 570, in *Frost* v. *Railroad Comm.*, 271 U. S. 583, in *Smith* v. *Cahoon*, 283 U. S. 553, and in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, implied declarations that the legislatures enacting the statutes in controversy considered the businesses regulated were "affected with a public interest." The express legislative declaration in the present case can have no greater effect. The language of Chief Justice Taft in *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 552, is conclusive (pp. 536, 539):

> "It is manifest that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one

in which the public has come to have an interest are a subject of judicial inquiry.

* * * * * * * * *

"If, as, in effect, contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. Civil Rights Cases, 109 U. S. 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment."

The position of the lower court and the contention of the the appellees is primarily based upon certain affidavits in the record which, it is said, "show an enormous increase of so-called private carriers for hire, with a shrinking and dwindling away of common carriers"; that, as a result, "the continuance of this condition will be the disappearance altogether of the common carrier from the roads," and that the common carrier is exposed "to unrestricted, unlimited, irregular, and destructive competition from carriers private in name, but public in fact, who unregulated, ply their vocation along the roads, seeking business any and every where." (53 F (2d) at 515; R. 139). It is urged that the public interest with which to clothe the business of this intervener and other truly private carriers arises from "the effect upon the established common carrier transportation services by rail and road, of the rapidly increasing use of the highways for the carriage of freight for hire by persons assuming the real or pretended status of private contract carriers, and asserting their business to be unregulable." (53 F. (2d) at 513, R. 135).

It is a manifest weakness in this position that those who

are private carriers and those who are not but assert themselves to be for the purposes of evading regulation are grouped in a single classification. It is from this heterogeneous classification that the argument proceeds. The statute is not merely for the purpose of protecting common carriers from the competition of private carriers like the intervener. It is to prevent competition by other common carriers who seek to escape the lawful control of the state. True private carriers must have their freedom of contract invaded because some common carriers falsely assert themselves to be private carriers. The state may control this private business because, although it has the power, and, as will be shown, it is the duty of its administrative officials under this very statute to make the distinction of fact between the two classes, the legislature may find it more convenient to regulate everybody in order to be sure that it reaches those whom under established constitutional limitations it may regulate.

It is plain that it is the unlawful competition of these uncertified common carriers at which the argument of economics is really directed. Its fallacy lies in the simple truth that the status of private carriage is not determined by assertion but is a question of law and fact. If there are, as is very likely, those who seek to hide common carrier enterprises behind the name of private carriage, it is a matter of administrative efficiency to find them and subject them to the civil and penal provisions of the applicable statutes. Such administrative effort is required by the statute now before the Court which in Section 6 (a) specifically provides that no permit shall be issued "unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier."

The existence of such carriers, however, should not be made the basis of imposing business regulations like these imposed by this statute upon purely private carriers, such as

this intervener, who operate under a single contract and do not hold themselves out in any manner to carry the goods of all. Otherwise stated, it is submitted that there can be no justification for this proposal to deprive the purely private enterprise of this intervener of the settled and fundamental protection of the Fourteenth Amendment because there are others, who though public carriers in fact, lay unfounded claims to the same protection.

The answer of Mr. Justice Sutherland to the same contention made in another case is conclusive. In *Frost* v. *Railroad Comm.*, 271 U. S. 583, 599-600, he said:

> "The court below seemed to think that, if the state may not subject the plaintiffs in error to the provisions of the act in respect of common carriers, it will be within the power of any carrier, by the simple device of making private contracts to an unlimited number, to secure all the privileges afforded common carriers without assuming any of their duties or obligations. It is enough to say that no such case is presented here; and we are not to be understood as challenging the power of the state, or of the railroad commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly."

Stripped of superlatives, the theory upon which it is sought to support the regulation of private carriage may be simply stated. Common carriers by motor truck are "affected with a public interest" and therefore may be subjected to business regulation, which the Texas legislature has seen fit to impose. Competition afforded by private carriers, and in larger measure by those who are private by assertion, but common in fact, tends to render the regulation of common carriers less effective than it might otherwise be. Therefore, to add to the efficacy of this regulation of common carriers, the heretofore private enterprise of

private carriers has become clothed with the public interest. Since it is so clothed, it may be subjected to the drastic regulations of the Texas statute designed to restrict or prevent private carriers from the fulfillment of pre-existing contracts and to prevent new private carriers from entering the business. It is this very same aim with which the California statute, held invalid in *Frost* v. *Railroad Comm.*, 271 U. S. 583, was enacted. As was said in that decision (p. 591):

> "Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions."

It is for these tenuous reasons that this court is asked to depart from the settled principles so recently reiterated in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262. To what ultimate result such a departure might lead can hardly be conjectured. If regulation can so beget regulation, the protections of private enterprise all are threatened. The privately owned and operated truck, representing over 85% of all trucks now in operation, is a chief competitor of the common carrier. If the drastic regulations of the Texas act may constitutionally be imposed, one result will be the increase of private ownership and operation of trucks by many shippers who previously employed private carriers. The competition thus afforded the authorized common carrier is no less direct. It follows logically from the appellees' argument that the privately owned and operated truck, which certainly uses the highways for purposes of industry and therefore of gain, may be regulated for the benefit of certified common carriers. The private automobile is the chief cause for the decrease in common carrier passenger revenues. (See *Co-ordination of Motor Transportation*, 182 I. C. C. 263, 312). It therefore may also be subjected to restrictive regulation, or excluded from the highways. Competitive fluctuations in the price of gasoline make scientific

rate making for motor driven vehicles difficult. Therefore the price of gasoline can be regulated—despite *Williams* v. *Standard Oil Co.*, 278 U. S. 235, specifically holding that it can not. The manufacture, sale and distribution of gas and electricity are commonplace public utilities. The rates of the vendors of coal and wood, who compete with them, may become fit subjects of restrictive legislation merely by virtue of that competition. A multiplication of analogies is not required to demonstrate the distance to which the principle might carry.

There is one final reason for which it is apparently proposed that the business of private carriage is clothed with the public interest. The record contains a number of affidavits of manufacturers and wholesalers, principally of hardware and food. (R. 259-72.) Each of these affidavits advocates the fixing of minimum rates of contract carriers. The reason given in each is the same. Under unregulated competitive conditions such as exist in the business of private carriage, these affiants, who employ private carriers, either "real or pretended," are unable to ascertain in advance what their competitors are paying for transportation. It is urged that minimum rates should be fixed "so that some definite amount of transportation charge may be known as between competitors dealing in the same commodity." (R. 261.) This, it is said, constitutes "discrimination as between competitors" and should be remedied by fixing minimum charges. (R. 258.)

That the correction of this alleged evil of discrimination was not the aim of the rate-fixing provision of Section 6aa is clear for the reason that this condition is not rectified by those provisions. This is true because the power to fix minimum rates may not be exercised by the Commission over all private carriers, but only those who operate "in competition with common carriers."

But even were it the purpose of this section partially to

prevent this uncertainty, no extended argument is necessary to show that this would not justify so arbitrary an invasion of the field of free private contract. The prices of food and hardware cannot be regulated. *Tyson* v. *Banton,* 273 U. S. 418, 440; *New State Ice Co.* v. *Liebmann,* 285 U. S. 262. It is absurd to say that such prices may be broken down into their component parts, and the costs of such parts subjected to regulation. If the charge for transportation under private contract may be fixed, so may the price for labor (but compare *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, *Adkins* v. *Children's Hospital,* 261 U. S. 525, *Wilson* v. *New,* 243 U. S. 332). So may the price of materials (but compare *Williams* v. *Standard Oil Co.,* 278 U. S. 235, *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1). By like reasoning the minimum charges of manufacturers may be regulated, so that some wholesalers may not be discriminated against, and so on down the line to the consumer. In a word, if the price of private carriage may be fixed for these reasons, the charges in all competitive businesses may be determined by legislative mandate.

One further consideration may be mentioned. If this Court should see fit to depart from settled precedents, and to accept the appellees' theory that the business of private carriage is regulable because of its competitive effect upon common carriers, the requirements of cargo insurance would still be unjustified. If minimum rates are to be fixed on the basis of those charged by competing common carriers, compulsory cargo insurance requirements imposed upon private carriers can have no effect upon their competition with common carriers. In fact, the private carrier has less to offer, competitively, if he does not carry such insurance.

The record discloses no demand for such insurance upon the part of the shipping public. As has been pointed out above, the question of cargo insurance is one which, it has

consistently been indicated, is to be determined by private agreement between shipper and contract carrier. The theory of the appellees, if accepted, would not, it is submitted, clothe the business of this intervener with a public interest to the extent that the freedom of contract guaranteed by the Fourteenth Amendment may thus be restricted. Compare *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522.

It is, therefore, submitted that if there is here any "public interest," it is too indirect and problematical to warrant the grave deviation from the decided cases necessarily inherent in a determination that the business of this intervener is "affected with a public interest."

4. *The regulations imposed upon the business of this intervener cannot be sustained as conditions precedent to the privilege of using the highways.*

It is not clear precisely to what extent the decision of the court below is based upon the proposition that since the state may exclude private carriers from the use of the highways, it may impose as conditions upon that use the unconstitutional permit, rate and insurance requirements.

While expressing difficulty in agreeing with the majority opinion in *Frost* v. *Railroad Comm.,* 271 U. S. 583, Circuit Judge Hutcheson concedes that if the case presented here is the same as that in the *Frost* case, it is controlling and "the power of the state must be denied." (53 F. (2d) at 514; R. 137.) Yet further on in his opinion he says (53 F. (2d) at 515; R. 140).

> "We think it perfectly plain that, as he never had a right on the roads, but merely a privilege as to them, it is too much to say that, when the state undertakes to impose upon him conditions different from those characterizing him at common law, his privilege flowers

> under the Fourteenth Amendment into a right which the state may not impair."

It is submitted that in this language, the learned judge presents the identical case considered in the *Frost* decision.

Whether or not the state has the power to exclude all private carriers is not in issue. Parenthetically, it may be said that since no state has ever sought to exercise this power, its existence has never been directly sustained by judicial decision of this or any lower Court. Compare *Weaver* v. *Public Service Comm.*, 40 Wyo. 462, 278 Pac. 542. In the *Frost* case, its existence was assumed, but not determined. (271 U. S. 583, 592-93) If we likewise assume, *arguendo*, that it exists the *Frost* case is conclusive authority that the grant of the privilege of using the highways may not be conditioned upon the submission to regulations which would not be constitutional if directly imposed. As has been shown, the provisions of the Texas act complained of constitute such regulations. Constitutional power cannot thus be used to reach unconstitutional results. It is clear, therefore, that the assumed power to exclude private carriers lends no weight to the arguments in support of the statute.

The learned judge employs a similar argument in sustaining the regulation of the rates and practices of private carriers. He says (53 F. (2d) at 514; R. 138):

> "Here is a case of a clear, a simple, a complete declaration of policy that the public has an interest in the business of carriage for hire over the highways of the State, a prohibition of the right to engage in such business except under a franchise, and an affixing to the enjoyment of a franchise the condition that the holder must become an integral part of the transportation system of the State, and must submit to the regulations applicable to his franchise as to rates and practices."

In this passage, the Court apparently assumes that the business of private carriage is one affected with the public interest to the extent that permits may be required of private carriers under Section 6. This, as has been shown, is an unjustified assumption. Taking this unwarranted premise that the permit requirements are valid and bestow upon the private carrier a franchise or privilege, the Court infers that such a privilege may be granted on the condition that the private carrier submit to regulation of its rates and practices, even though the business of contract carriage is not clothed with the public interest to the extent that its rates may be validly fixed by direct legislative action. Compare *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, 539. It is manifest, upon this analysis, that here again the Court falls into error in upholding as conditions requirements otherwise unconstitutional. *Frost* v. *Railroad Comm.,* 271 U. S. 583, is clearly applicable to this argument. *Williams* v. *Standard Oil Co.,* 278 U. S. 235, in which it was held that regulation of the rates of gasoline sold by a foreign corporation could not be conditioned upon the privilege granted that corporation to do business, is also controlling.

CONCLUSIONS.

For the foregoing reasons, that the statutory provisions complained of are an unconstitutional invasion of the right of this intervener, a private carrier, to be free from interference, under the guise of regulation, with his private business and liberty of contract is

Respectfully submitted,

LaRue Brown,
Boston, Mass.

L. E. Blankenbecker,
Franklin & Blankenbecker,
Houston, Texas.

Attorneys for D. A. Beard,
Intervener.

Horace P. Moulton,
Of Counsel.

Boston, November, 1932.

FILE COPY

FILED
NOV 14 1932
CHARLES ELMORE CROPLEY
CLERK

No. 326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

J. H. STEPHENSON ET AL., Appellants,

vs.

T. BINFORD ET AL., Appellees.

BRIEF ON BEHALF OF APPELLANTS

JOHN H. CROOKER,
WILLIAM B. BATES,
LEON JAWORSKI,
Solicitors for Appellants.

FULBRIGHT, CROOKER & FREEMAN,
State National Bank Bldg., Houston, Texas.
Transportation Building, Washington, D. C.

McQUEEN-YOUNG CO., HOUSTON

INDEX OF CONTENTS

	PAGE
Opinions of the Court Below	1
Jurisdiction	1- 2
Concise Statement of Case	2- 5
Specifications of Error	5
Summary of Argument	5- 7
POINT I.* The provisions of House Bill No. 335, passed by the 1931 Legislature of Texas, are tantamount to compelling appellants, admittedly private contract carriers, to dedicate their property to the quasi public use of public transportation, thus taking their property for public use without adequate compensation, in violation of the due process clause of the Fourteenth Amendment	7-12
POINT II. Appellants being carriers for hire under private contract, their business is in no sense "affected with a public interest," hence the provisions of House Bill 335, passed by the 1931 Legislature of Texas, subjecting their business to certificate regulation, rate-fixing and placing their business generally under the control of the Railroad Commission, deprives them of their property without due process of law, in contravention of the Fourteenth Amendment	13-22
POINT III. Appellants being carriers for hire under private contract, the legislature cannot by mere legislative declaration convert appellants' purely private business into one affected with a public interest, and the attempt to do so through the pro-	

*Only the substance of Points I, II and III is given in this Index.

PAGE

visions of House Bill No. 335, passed by the 1931 Legislature of Texas, is in contravention of the Fourteenth Assignment 22-26

POINT IV. House Bill No. 335, passed by the 1931 Legislature of Texas, requires that appellants obtain a permit which is in the nature of a certificate of public convenience and necessity, and subjects appellants to other regulations before they can lawfully operate upon the highways, which said requirements are not made as to certain designated private carriers similarly situated, and in this appellants are denied the equal protection of the laws, in violation of the Fourteenth Amendment 26-39

POINT V. House Bill No. 335, passed by the 1931 Legislature of Texas, denies to appellants the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it regulates their business and the conduct thereof on the highways of the State of Texas in a number of particulars, which regulations it does not apply to persons using the highways who are transporting their own commodities under substantially the same conditions 29-30

Conclusion 30

Appendix "A" 31-54

Appendix "B" 55-67

INDEX OF AUTHORITIES

	PAGE
Air-way Electric Appliance Corporation v. Day, 266 U. S. 71	27
Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923	27
Continental Baking Company v. Woodring, U. S. Supreme Court Advance Opinions of June 20, 1932, 76 L. Ed.	12
Copping v. A. A. Godard, 183 U. S. 79, 46 L. Ed. 92	27
Frost v. Corporation Commission, 278 U. S. 515	27
Frost v. Railroad Commission, 271 U. S. 583	10, 25
G. C. & S. F. R'y Co. v. Ellis, 165 U. S. 150	28
Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. Ed. 770	28
Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 69 L. Ed. 445, 45 Sup. Ct. Rep. 191	11
Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77	16
New State Ice Company v. Liebmann, U. S. Supreme Court Advance Opinions of April 11, 1932, 76 L. Ed.	18
Ribnik v. McBride, 277 U. S. 350	17, 21
Royster Guano Co. v. Virginia, 253 U. S. 412	27
Schlesinger v. Wisconsin, 270 U. S. 230	27
Smith v. Cahoon, 283 U. S. 553	11, 28
Sproles v. Binford, United States Supreme Court Advance Opinions of June 20, 1932, 76 L. Ed.	25
Terminal Taxicab Company v. Kutz, 241 U. S. 252, 60 L. Ed. 984	20
Tyson & Bro. v. Banton, 273 U. S. 418, 47 Sup. Ct. Rep. 426	16, 20
Williams v. Standard Oil Co., 278 U. S. 235	17, 20
Wolff Packing Company v. Court of Industrial Relations, 262 U. S. 522, 67 L. Ed. 1103, 43 Sup. Ct. Rep. 630	14, 23

No. 326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

J. H. STEPHENSON ET AL., Appellants,

vs.

T. BINFORD ET AL., Appellees.

BRIEF ON BEHALF OF APPELLANTS*

OPINIONS OF THE COURT BELOW

A statutory Three-Judge Court, denying an application for temporary injunction, filed a majority opinion, written by Circuit Judge Hutcheson. At the same time, Judge Kennerly filed his dissenting opinion, both opinions being reported in 53 Fed. (2nd) 509, and both appearing in the Record at pages 129 to 142, inclusive. On final hearing the application for permanent injunction was denied, a memoranda opinion being filed, wherein the views expressed in the earlier opinions were adopted and affirmed—Judge Kennerly still dissenting from the majority opinion. This latter opinion is not yet officially reported, but appears in the Record at page 288.

JURISDICTION

In conformity with the rules, a "Statement of Basis of

* Indications of emphasis herein are ours unless otherwise indicated.

Jurisdiction'' has been filed herein, and an order entered noting probable jurisdiction (not officially reported).

CONCISE STATEMENT OF CASE

This case involves the validity of an Act of the Texas Legislature (complete text in Appendix A of this brief), complaint being made that the Act violates the equal protection clause and the due process clause of the Fourteenth Amendment.

Each of appellants (complainants below) was and is a **private contract carrier exclusively,** operating one, or some few, trucks under **one contract** with **one owner** of goods. This was found by the court below. (Finding of Fact VII, R. 172.) The manner and character of such operations were detailed by each complainant (R. 208-222, inc.), and the status of appellants as **small private contract carriers** is in no way assailed.

Appellants' attack is based on the attempt of the Act to prevent the operation of a truck over the highways pursuant to one private contract with one owner of goods, without compliance with various onerous burdens which have no reasonable relation to highway safety or preservation—but are such as might be required of **common carriers.** Some of these onerous burdens weighted upon the back of the owner of a truck before he may haul his neighbor's goods over the highways for some small compensation are as follows:

(a) He must apply to the Railroad Commission of Texas for what really amounts to a **certificate of public convenience and necessity**—misnamed by the Act a "permit"—issued only after a full hearing

in which applicant must show full compliance with all provisions of the statute. (Section 3.)

(b) The Railroad Commission is forbidden to issue any such "permit" unless it determines that the proposed operation will not impair the efficient public service of authorized common carriers then adequately serving the same territory. [Section 6 (c).]

(c) It is made the duty of the Railroad Commission to supervise and regulate the transportation operation of all Motor Carriers (including **private contract carriers** as well as common carriers), and to fix, prescribe and approve the maximum or minimum, or maximum and minimum, rates, fares and charges of such carriers. [Section 4 (a).]

(d) It is made the duty of the Railroad Commission in prescribing such minimum rates, fares and charges to be collected by such **private contract carriers,** that the same **shall not be less than the rates prescribed for common carriers for the same service.** [Section 6 (aa).]

(e) Before any "permit" may be issued to any motor carrier (including, of course, private contract carriers), and before any such private contract carrier may lawfully operate under such permit, he must file with the Commission insurance policies covering the cargo that will be transported by him as such private contract carrier, the amount of such cargo insurance being prescribed by the Commission. (Section 13.)

(f) It is made the duty of the Railroad Commission to

require all motor carriers (common carriers and private contract carriers alike) to keep a set of accounts, strictly in accordance with such classification of accounts and rules in respect thereto as may be established by the Railroad Commission, and to file reports and such other data as the Commission may deem necessary. [Section 13 (b).]

(g) The Railroad Commission may issue "special permits" to those carriers—either common or contract—who desire to engage in the business of transporting for hire, over the highways of this State, certain commodities such as livestock, mohair, wool, milk, livestock feedstuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain. [Section 6 (d).]

(h) Special driver's licenses must be obtained by the drivers of trucks belonging to motor carriers—both private contract carriers and common carriers alike—regulating the number of hours such driver can continuously operate a truck, and prescribing his rest periods; and the Railroad Commission is given the right to supervise the character of vehicle used, the number and amount of articles that can be transported on any particular vehicle, et cetera—while the shipper-owner is at liberty to operate as he pleases in these respects. [Section 4 (b), Section 6 (cc), and Section 13 (a).]

The court found that pursuant to the provisions of the

Act in question the Railroad Commission promulgated minimum rates to be charged and received by all private contract carriers, and that said rates prescribed as a minimum are higher than, and in excess of, the rates and charges fixed by the several private contracts between appellants and their customers. (Finding of Fact XIII, R. 174.) In its Finding of Fact XIV the court found that each of the appellants have been threatened with arrest and prosecution by enforcement officers of the State for failure to comply with the provisions of the Act. (R. 174.)

Attention is respectfully directed to the agreement by all parties to this suit and fully approved by the court, whereby the application for permanent injunction was heard on affidavits and exhibits—it having been agreed by counsel and by the court that the matter could be heard more satisfactorily in this manner—yet amply developed.

SPECIFICATIONS OF ERROR

All of the errors assigned in connection with this appeal are intended to be urged, but as many of them are directed to some of the court's findings, they are embodied in Appendix B of this brief, and may also be found on page 183 of the Record. The greater portion of the court's findings appearing to appellants to be superfluous and without support in the evidence, errors were assigned as to these, and assignments of error were also directed at the conclusions of law.

SUMMARY OF ARGUMENT

Constitutional guaranties forbid changing by mere legis-

lative fiat the status of a private contract carrier into that of a common carrier against his will.

For a business to be "affected with a public interest," it must be such "as to justify the conclusion that it has been **devoted** to a public use and its use thereby, in effect, **granted** to the public" (Mr. Justice Sutherland), and the term is not so yielding and flexible as to include the business of a private contract carrier, conducted pursuant to a **single** contract with ONE shipper.

Legislative declaration that a certain business is affected with a public interest does not establish it as being such, but "the matter is one which is always open to judicial inquiry."

By providing (a) that no private contract carrier shall be given a permit to operate upon the highways if the Commission be of the opinion that the proposed operation of such carrier will impair the efficient public service of any authorized common carriers then adequately serving the same territory, and (b) that the Railroad Commission shall prescribe the rates such private contract carrier may charge for his services, which rates, in no event, shall be less than the rates prescribed for a common carrier performing substantially the same service—among other provisions—the legislature is attempting to regulate purely private business belonging to appellants, contrary to constitutional guaranties.

The legislature cannot regulate the purely private business of appellants by attempting to invest the Railroad Commission with power and authority to require appellants to file such monthly, annual or other reports and data as the Commission may deem necessary, and to require them to keep accounts strictly in accordance with such classification of accounts and rules as may be pre-

scribed by said Commission. Nor can the legislature "regulate" appellants' said business by requiring them to carry insurance to cover the cargo transported by them.

Permitting certain contract carriers, similarly situated as appellants, but engaged in hauling commodities other than those transported by appellants, to obtain "special permits" from the Railroad Commission without first having to comply with the provisions of the Act, is an arbitrary designation of part only of a general class, not based on anything having reasonable relation to the subject-matter of the Act.

To require private contract carriers to employ only such drivers as have passed a special examination and obtained a special chauffer's license—to regulate the number of hours such drivers can operate trucks and the number of hours such drivers must rest—and to regulate the manner of loading the cargo, et cetera, of private contract carriers—all without placing the shipper owner and others situated exactly as appellants are situated under similar regulations, creates an arbitrary and unreasonable designation of part only of a comprehensive class, not based on anything having relation to the subject-matter of the Act.

ARGUMENT

Point I.

The provisions of House Bill No. 335, passed by the 1931 Legislature of Texas, as applied to appellants, all of whom are private contract carriers, are tantamount to *compelling appellants to dedicate their property to the quasi public use of public transportation* before they can operate their motor vehicles over the high-

ways of the State of Texas, as provided for in their private contracts, resulting in the taking of their property for public use without adequate compensation, and thus depriving them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution.

A casual reading of the Act, and more particularly Sections 6 and 6aa thereof, will suffice to show conclusively that the "permit" required of the private contract carrier before he can use the highways as such is nothing short of a certificate of public convenience and necessity, as that term is ordinarily used and understood in connection with common carrier regulations. Although the word "permit" is used—nevertheless, the substance of the provision is no more and no less than to require a certificate of public convenience and necessity. Subdivision (c) of Section 6, in unmistakable terms, provides that if the Commission be of the opinion that the proposed operation of any applicant for a contract carrier "permit" will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territories, **the permit shall not be granted.** It is submitted that this is but another **form** of placing the private contract carrier's right to operate on the basis of "public convenience and necessity," usually applied to common carriers.

Section 4 (a) of the Act vests the Commission with the power and authority and makes it the **duty** of the Commission to supervise and regulate the transportation of property for compensation or hire by **private contract carriers** on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier

(common carrier and **private contract carrier** alike), in accordance with specific provisions contained in the Act, to prescribe all rules and regulations necessary for the government of all motor carriers, to prescribe rules and regulations for the safety of operation of each of such motor carriers, to require the filing of such monthly, annual or other reports and other data of all motor carriers as the Commission may deem necessary, and to supervise and regulate all motor carriers in all matters affecting the relationship between such carriers and the shipping public, whether in said Act specifically mentioned or not—all these provisions being applicable alike to common carriers and to **private contract carriers.** In other words, as to all of these matters mentioned, the private contract carrier is subjected to the same regulations and placed on the same footing as is the common carrier.

Under the provisions of Section 6 (aa) of the Act, the Commission is vested with power and authority and it is made its **duty** to prescribe rules and regulations governing the operation of **private contract carriers** whom the Act treats as being in competition with common carriers over the highways of the State, and the Commission is required to "prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service." The most potent and effective manner of **controlling** and **regulating** the business of a common carrier is to invest a body or commission with the right to prescribe and dictate the rates such carriers shall be allowed to charge—fixing the maximum and the minimum thereof. That this is both a proper and a necessary method of control over a carrier who tenders his services to the public generally—who has in effect **granted**

the public an **interest** in the **use** of his property and who deals with the public at large, cannot be denied. Because the very **character** of his business means serving the public at large, his charges must of necessity be made uniform.

But here we have the legislature placing, as to these things, the **private contract carrier** on a parity with the **common carrier,** subjecting him to the same method of control as is applied to the common carrier. Though his entire dealings be—not with the public at large—but with a single shipper, his rights of private contract as to rates and charges are wrested from him and, like the common carrier who serves anyone and everyone, the rates he can charge for his services are prescribed. Having been forced to submit to such control and regulation of his business, what has become of his former status as a **private contract carrier?** Though unwilling he may have been, he finds himself converted into a **common carrier.** And why? This court answers that question in the case of Frost v. Railroad Commission, 271 U. S. 583—wherein the State of California sought to subject Frost, engaged under a single private contract in transporting citrus fruit for a stipulated compensation over the public highways, to an act requiring of him a "permit" similar to the one herein involved and subjecting him to rates fixed by the Railroad Commission, in the following words:

> "It is very clear that the Act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. **Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions.** Protection or conservation of the highways is not involved."

This court then branded as being unconstitutional any

effort to transform a private carrier into a common carrier by legislative fiat in the following words:

> "That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt, and is not brought into question here."

(Citing the case of Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 69 Law Ed. 445, 45 Sup. Ct. Rep. 191, and other cases.)

In the Michigan Public Utilities Commission v. Duke case, 266 U. S. 570, cited in the Frost case, *supra*, the Commission, pursuant to the authority given it by the legislature sought to require of Duke a permit in the nature of a certificate of convenience and necessity and to subject him to regulation as to rates he could charge for his services. Duke operated under three contracts, and was clearly a contract carrier. He did not hold himself out as a carrier for the public. Speaking through Mr. Justice Butler, this court said:

> "Moreover, it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment." (Citing authorities.)

Again, in the case of Smith v. Cahoon, 283 U. S. 553, this court, in passing upon the validity of a Florida statute as applied to a contract carrier, speaking through Mr. Chief Justice Hughes, said:

> "It is true that the statute does not in express

terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the State." (Citing authorities.)

At its last term, this court passed upon the validity of a Kansas statute exacting of both common and private carriers certain requirements, **but applying to the two classes entirely different regulations.** In upholding the Act in the case of Continental Baking Company v. Woodring, United States Supreme Court Advance Opinions of June 20, 1932, 76 L. Ed. ....., this court pointed out with particularity that under the provisions of the Act, "Common carriers and **not private carriers** are required to obtain certificates of public convenience and necessity. **The former and not the latter are put under regulations as to fares and charges,"** * * * "Private motor carriers of property must obtain a license, pay a tax and file a liability insurance policy. The Public Service Commission **has no authority to refuse** a license if the described information is given with the application, the liability insurance policy is filed, and there is compliance with the regulations and payment of the license fee." The Kansas statute **made no attempt to regulate the business of the private carriers,** and the unconstitutional vices inherent in the Act under attack were carefully eliminated in the Kansas statute. The position of that statute, we submit, is clearly on "the other side of the line."

It follows that this court has definitely set at rest the question at issue, and that the Act under inquiry transgresses the constitutional guaranties of appellants.

Point II.

Appellants being carriers for hire under private contract, their business is in no sense "affected with a public interest," hence the provisions of House Bill No. 335, passed by the 1931 Legislature of Texas, compelling appellants to obtain permits which are, in effect, certificates of public convenience and necessity, before they are permitted to use the highways in pursuit of their business, and which said Act regulates their business by (*a*) subjecting them to the rules and regulations of the Railroad Commission, whose duty it is made to fix, prescribe or approve the maximum or minimum, or maximum and minimum, rates, to prescribe rules and regulations necessary for their government, and to require such monthly, annual or other reports and data from them as the Commission may deem necessary, and to regulate them in all matters respecting the relation between them and the shipping public, whether it is specifically mentioned in the Act or not, (*b*) prohibiting them from collecting lesser rates for their services than the minimum prescribed for common carriers for substantially the same service, and (*c*) placing their business generally under the control and regulation of the Railroad Commission—deprives them of their property without due process of law, and in this is in contravention of the Fourteenth Amendment to the Constitution of the United States.

Indeed, the pronouncements of this court, cited under Point I, have so definitely and with such finality branded as unconstitutional all efforts on the part of a State to transform a private carrier into a common carrier against

his will, that appellees, in attempting to save the Texas statute from meeting the same fate as did the California, Michigan and Florida statutes, have of necessity searched arduously for a possible avenue of escape. To be sure, no material difference in this statute and the ones involved in the Frost, Duke and Cahoon cases could be discerned, but the search made by appellees brought to their attention the fact that in those cases the "affected with a public interest" theorem was not invoked nor discussed. Failing to find any other possible basis for sustaining the asserted constitutionality of the Act, appellees have invoked this much overworked and abused doctrine. We submit that the failure of this court to consider it in the cases just referred to was due solely to its absolute inapplicability to the matters at issue in each of those cases, as well as in the case at bar.

In Chas. Wolff Packing Company v. Court of Industrial Relations, 262 U. S. 522, 67 L. Ed. 1103, 43 Sup. Court Reporter, 630, this Honorable Court, to the end that the broad and loose term "affected with a public interest," as it then existed, might be given a clearer and more definite place in American jurisprudence—explained and classified it as follows:

> "Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:
>
> "(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities."
>
> "(a) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbi-

trary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and gristmills."

"(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly."

This court, of late, has had occasion to weigh and determine the status of a number of various businesses, contended by the State to have become "affected with a public interest," and on each occasion the foregoing classification was used as the standard. During recent years, the application of this aphorism has become quite popular with legislatures that were desirous of regulating certain businesses by fixing the prices and rates. In such instances the legislatures have relied on the third of the categories formulated by this court in the Wolff case, *supra*. This is also true in the case at bar. The first classification clearly excludes appellees' theory, for there does not rest on appellants (in the conduct of their business) "the affirmative duty of rendering a public service demanded by any member of the public"; the second so specifically mentions the occupations to which the doctrine is applicable, that appellees realize, we are sure, the futility of attempting to apply it to the business of appellants—so there remains but the third classification, and upon it appellees' contention must be predicated. It, too,

when considered in the light of this court's decisions, holds no applicability to appellants' businesses.

Although a general statement or two contained in the case of Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77, 84, may have caused for a while some doubt as to the proper application of the term "affected with public interest," this court, during recent years, has given it a fixed and well-defined meaning—at least as to those businesses falling within the third category of the classification made in the Wolff case, *supra.*

The State of New York by statute attempted to regulate the business of re-selling tickets of admission to theaters and other places of amusement, which were obtained either from the box office of the theater or from other brokers dealing in such tickets. The Act declared that the price of or charge for admission to theatres and other places of amusement was a matter affected with a public interest—there having been prevalent considerable fraud and extortion, as well as other abuses, in the conduct of that business. In passing upon the validity of that statute, this court, in the case of Tyson and Bro. v. Banton, 273 U. S. 418, 47 Supreme Court Reporter 426, held the business to be one not affected with a public interest, saying, through Mr. Justice Sutherland, that:

> " * * * A business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been **devoted** to a public use and its use thereby, in effect, **granted** to the public." (Emphasis appears in opinion.)

The foregoing definition, since its formulation, has been applied several times by this court. It has become practically axiomatic. Not long after its decision in the

Tyson case, *supra,* this court was called upon to decide the validity of an Act passed by the legislature of New Jersey, designed to regulate employment agencies, and requiring that everyone operating such an agency must first procure a license from the Commissioner of Labor, and giving the Commissioner of Labor the right to regulate the schedule of fees et cetera. The constitutionality of the Act was assailed before this court in the case of Ribnik v. McBride, 277 U. S. 350, and again the State defended its Act by contending that the business it sought to regulate was one affected with a public interest. The same definition enunciated in the Tyson case was applied, and in holding the business to be one unaffected with a public interest, this court, speaking through Mr. Justice Sutherland, said:

> "Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control." • • •
>
> "To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulations, but not for price fixing, as we have already definitely decided."

In the case of Williams v. Standard Oil Company, 278

U. S. 235, there was before this court for consideration a statute of Tennessee, having as its purpose and effect the fixing of prices at which gasoline could be sold within the State, and requiring permits for such sale to be issued subject to the approval of the Commissioner of Finance, but only at the prices fixed and determined. This court once more was asked to uphold the regulation on the ground that the business was one "affected with a public interest." In answer, this court declared the Act unconstitutional, and, again speaking through Mr. Justice Sutherland, said:

> "As applied in particular instances, its (affected with a public interest) meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been **devoted** to a public use and its use thereby in effect granted to the public. (Citing Tyson v. Banton, supra.) Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance." (Emphasis appears in opinion.)

The State of Oklahoma sought to regulate its ice industry by compelling those who manufacture, sell or distribute the product to first obtain from the Corporation Commission a license, not to be issued except upon proof of the necessity for a supply of ice where the business was to be established, and by authorizing a denial of the application where the existing facilities sufficed to meet the public needs. This court, at its last term, in the case of New State Ice Company v. Liebmann, 76 L. Ed. ....., U. S. Supreme Court Advance Opinion of April 11, 1932, p. 479, held the Act unconstitutional, classing the business

as being a private one, unaffected with any such public interest as would warrant its control by legislation.

We respectfully refer the court to the testimony of each of appellants. Unquestioned by appellees, it shows that each of appellants is operating as a **private contract carrier pursuant to one contract with one single shipper, and that this is the extent of his operations.** (R. 208-222, inc.) His daily operations bring him in contact with only one shipper, from whom his entire compensation is collected. Wherein, may we ask, has his business "been **devoted** to a public use and its use thereby in effect **granted** to the public?" If appellants' few trucks are devoted to a public use, then, we submit, the private contract carrier has become extinct and his business, which imports transporting for an individual or individuals under private contract and not the transporting of goods for the public, has become a thing of the past. If this can be done, the injunction of this court that private carriers cannot be converted into common carriers against their will, by legislative fiat, as announced in the Frost, Duke and Cahoon cases, supra. had just as well been left unwritten.

But it may be said that there are in the State of Texas a rather large number of private contract carriers, that they conduct a large proportion of the transportation operations by motor carriers in the State, that the common carrier motor carrier and the rail carrier suffer by reason thereof, and that surely, under those circumstances and conditions, the private contract carrier's business has become affected with a public interest. We prefer to answer this contention of appellees in this court's own words:

> "A business is not affected with the public interest merely because it is large or because the public are

warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood." (Tyson v. Banton, *supra*, p. 430.)

"In support of the Act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the State. But we are here concerned with the **character of the business,** not with its size or the extent to which the commodity is used." (William v. Standard Oil Co., supra, p. 240.)

By unanimous opinion, this court, in the case of Terminal Taxicab Company v. Kutz, 241 U. S. 252, 60 L. Ed. 984, held that such part of the Taxicab Company's business as related to furnishing automobiles from its central garage, on individual orders, generally by telephone, cannot be regarded as a business affected with a public interest and **that the rates charged for such service were not open to inquiry by the Public Utilities Commission.** And the opinion, written by Mr. Justice Holmes, discloses that the court, in deciding the case, assumed that the Taxicab Company, in conducting this particular phase of its business, "generally accepts any seemingly solvent customer." In the conduct and furtherance of the business of each of appellants herein, there is a total absence of such a relation with "any seemingly solvent customer," but the services are confined to ONE SHIPPER. Is not such a business of a taxicab company essentially more apt to have a "public aspect" than that of each of appellants,—and if

so, can it be logically contended, in the light of the above cited decision, that the latter's business is one affected with a public interest?

And again we refer to the statement of this court in the case of Ribnik v. McBride, supra, set out hereinabove, wherein the court said that contentions of existence of imposition, discrimination, extortion, and the like in connection with the conduct of the business, or that the business is one lending itself peculiarly to evils of this character, were matters the court could not consider in ascertaining whether the business was affected with a public interest;—that such facts were grounds for **regulation but not for price fixing.**

May we suggest, that if this business of appellants, so private in character, can be regulated as to rates to be charged, the legislature can find an escape from constitutional inhibitions in practically every instance it may desire to regulate the private business of the citizen. In the Tyson case, *supra,* much stress was laid by the State on the fact that to permit the reselling of theatre tickets for unregulated prices meant the practicing of much fraud, extortion, et cetera. The answer given by this court pointed out the danger of the State beginning to regulate businesses on the ground of asserted "necessity." It was said: "But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods precluded by the Constitution. Such subversions are not only illegitimate but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and finally as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a

general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship or injustice."

We therefore submit that it is plain and clear that **the operation by any one of appellants of his one truck (or his few trucks—as the case might be) under one contract with one owner of goods, cannot possibly clothe that business with any such public interest as will constitute its DEVOTION to public use.** Indeed the facts here do not present even a "border line" case, and the pretense of "public interest" will be laid aside and the right of private contract upheld.

Point III.

Appellants being carriers for hire under private contract, their business is one wholly unaffected with a public interest, and the legislature cannot by mere legislative declaration convert such purely private business into one affected with a public interest, so as to be able to control and regulate the business of appellants as is attempted to be done through the provisions of House Bill No. 335, passed by the 1931 Legislature of Texas. This enactment regulates the business of appellants by (*a*) demanding of them a permit which is in effect a certificate of public convenience and necessity before they can operate their motor vehicles pursuant to mere private contract; (*b*) prohibiting them from collecting lesser rates for their services than the minimum prescribed for common carriers for the same service; (*c*) subjecting them to rules and regulations of the Railroad Commission, whose duty it is made to fix, prescribe or approve the maximum or minimum, or maximum and

minimum, rates, different from the existing private contract, to prescribe rules and regulations necessary for their government, and to require such monthly, annual or other reports and data from them as the Commission may deem necessary, and to regulate them in all matters affecting the relationship between them and the shipping public, whether it is specifically mentioned in the Act or not; (*d*) requiring, contrary to private contract, that they carry insurance to cover the cargo transported by them; (*e*) requiring that they keep accounts strictly in accordance with such classification of accounts and rules as may be prescribed by the Commission, and to file reports and such other data as the Commission may deem necessary. Said provisions of the Act, as applied to appellants, abrogate the right of private contract, deprive them of their property without due process of law, and in this are in contravention of the Fourteenth Amendment to the Constitution.

The mere declaration by the Texas Legislature that appellants' businesses have become "affected with a public interest," cannot establish them as being such. To the contrary, this court has held that irrespective of what the legislature may have to say on the subject,—no matter what its opinion and declaration may be as respects the matter, it is always a matter for judicial inquiry. In its declaration of policy (Section 22-b), the legislature said:

> "The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest."

The rule has become firmly established that, as was said by this court in the Wolff case, supra, "The mere declara-

tion by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest, are **always** a subject of judicial inquiry."

The foregoing pronouncement made in the Wolff case, **supra**, was reiterated by this court in the Tyson case, **supra**.

Of particular significance, however, are these statements contained in the declaration of policy set out in the statute under discussion:

> " * * * That more stringent regulations should be employed. * * * That discrimination in **rates charged** may be **eliminated;** * * * that the use of the highways for the transportation of property for hire may be restricted to the extent **required by the necessity of the general public.**"

And in this latter statement incorporated in the declaration of policy, we find a conclusive answer to the query as to whether the "permit" provided for in the Act is not, in substance and in fact, a certificate of public convenience and necessity. Suffice it to say that it is manifest from the decisions of this court, cited under Points I and II, that the State is clearly without right to carry out the quoted declarations through the provisions of the Act in question.

The argument that the Act in question is valid because the contract carrier pursues his business by reason of a mere privilege granted him at the hands of the State, and that therefore the latter could entirely prohibit the use of the highways by the carrier as such, is likewise unten-

able. Because it can prohibit, does not empower it to limit unconstitutionally. The precise argument was made in the Frost case, *supra,* and in reply this court said:

> "It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Application was given the foregoing rule, in virtually the same words, in the case of Williams v. Standard Oil Company, *supra.*

As was so tersely stated in the Frost case, supra, "protection or conservation of the highways is not involved," and when business is regulated through the medium of controlling rates, it is then plain, that "its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions." This court is aware of the companion enactment (House Bill 336) to the Act in question. That Act had for its purpose protection and conservation of the highways, in that it limited the height, width and length of the motor vehicles traversing the highways, and also limited the net load of such vehicles to a **maximum of 7,000 pounds.** The Act received this court's scrutiny in the case of Sproles v. Binford, at its last term, and was held constitutional (U. S. Supreme Court Advance Opinions, June 20, 1932, 76 L. Ed.....). Most of the "grievances" advanced

in appellees' testimony relate to protection and conservation of the highways,—conditions fully and amply met through the enactment of this companion bill, House Bill 336. The remainder of the "grievances" pertain to competitive conditions and to the asserted value of rate fixing, —matters the State has **no right to regulate.**

Point IV.

House Bill No. 335, passed by the 1931 Legislature of Texas, requires that appellants obtain a permit which is in the nature of a certificate of public convenience and necessity, and subjects appellants to other regulations before they can lawfully operate upon the highways, which said requirements are not made as to certain designated private carriers similarly situated, and in this appellants are denied the equal protection of the laws, in violation of the Fourteenth Amendment.

Section 6 (d) of the Act authorizes the Railroad Commission to issue special permits, conditioned and restricted as the Commission may deem proper, to those persons who desire to engage in the business of transporting for hire over the highways of the State, livestock, mohair, wool, milk, livestock feedstuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain,—without requiring of these specially-privileged carriers a compliance with the onerous provisions of obtaining a permit in the nature of a certificate of public convenience and necessity, regulation of rates, method of loading, number of containers, et cetera.

Appellants are not engaged in the business of transport-

ing for hire over the highways of this State the exempted commodities mentioned above. The particular shipper with whom each of appellants has his respective contract, requires the hauling of a large variety of commodities other than those exempted, but many of which are quite similar. And merely because the operations of each of appellants are not confined to the transporting of a commodity included in the class exempt in the Act, he is compelled to make full compliance with the burdensome provisions of this Act.

If the State Legislature, in enacting laws, arbitrarily or unjustly discriminates between persons or commodities that are similarly conditioned with reference to the things legislated upon, then the organic provisions securing property rights are violated. No greater burdens may be laid upon one thing than are laid upon others in the same situation with respect to the subject legislated upon. See Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923.

Arbitrary selection can never be justified by calling it "classification." The classification must be one which is based upon some difference which bears a proper relation to the attempted classification. See Copping v. A. A. Godard, 183 U. S. 79, 46 L. Ed. 92, and cases there cited.

This court said in the case of Frost v. Corporation Commission, 278 U. S. 515:

> "The classification, in order to be valid, must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced must be treated alike. F. S. Royster Guano Co. v. Virginia, 253 U. S. 412; Air-way Elec. Appliance Corp. v. Day, 266 U. S. 71; Schlesinger v. Wisconsin, 270 U. S. 230, 43 A. L. R. 1224. That is to say mere difference is not enough; the attempted classification must always rest upon some difference which bears a reasonable

and just relation to the Act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. G. C. & S. F. R'y Co. v. Ellis, 165 U. S. 150; Louisville Gas & E. Co. v. Coleman, 72 L. Ed. 770."

In Smith v. Cahoon, *supra*, this court held unconstitutional an effort by the Legislature of Florida to make exemptions of the very kind contained in the Act in question. In the opinion it is said:

"The principle that the State has a broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this court (citing a number of authorities). But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discrimination and what is arbitrary, regard must be had to the particular subject of the State's action. In the present instance the regulations as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety.

"This is a matter of grave concern as the highways become increasingly crowded with motor vehicles and we entertain no doubt of the power of the State to insist upon suitable protection of the public against injury through the operations over the highways of carriers for hire, whether they are common carriers or private carriers. **But in establishing such a regulation there does not appear to be the slightest justification for making a distinction between those carrying for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, tea or coffee or groceries, in general, or other useful commodity.** So far as the statute was designated to safeguard the public with respect to the highway, we think that the discrimination here made between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and the car-

rier, such as appellant, was wholly arbitrary and constituted violation of appellant's constitutional rights. Such a classification is not based on anything having relation to the purpose for which it is made."

Point V.

House Bill No. 335, passed by the 1931 Legislature of Texas, denies to appellants the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it regulates their business and the conduct thereof on the highways of the State of Texas, in a number of particulars, which said regulations it does not apply to persons using the highways who are transporting their own commodities under substantially the same conditions.

The Act subjects appellants' drivers to a special examination and chauffeur's license [Section 4 (b)], regulates the number of hours which appellants' drivers can continuously operate trucks, as well as the required rest period [Section 6 (cc)], supervises the character of vehicles appellants can use in their said transportation businesses, the number and amount of articles that can be transported on any particular vehicle by them, as well as the manner of loading their trucks [Section 13 (aa)], the manner of bookkeeping [Section 13 (b)], and, in fact, every phase of appellants' said businesses [Section 4 (a)]. Under the provisions of the Act, persons using the highways under substantially the same conditions, but who are transporting their own commodities—commonly known as the "Shipper-Owner"—are not subjected to these regulations. It is submitted that such legislation is wholly ar-

bitrary, and unjustly discriminates against private contract carriers, such as appellants, and constitutes a denial to them of the equal protection of the laws. The statements made and authorities cited under Point IV are equally as applicable under this point, and a reference is respectfully made to same.

CONCLUSION

We submit that for the reasons set forth above the Act in question is unconstitutional and void; that the judgment of the court below should be in all respects reversed, and appellants' application for injunction be granted as prayed for.

Respectfully submitted,

John H. Crooker

JOHN H. CROOKER,
WILLIAM B. BATES,
LEON JAWORSKI,
Solicitors for Appellants.

FULBRIGHT, CROOKER & FREEMAN,
State National Bank Bldg., Houston, Texas.
Transportation Building, Washington, D. C.

APPENDIX "A"

"An Act to amend chapter 314, General Laws of the State of Texas, Forty-first Legislature, Regular Session, as amended by Chapter 24 of the General Laws of the Second Called Session thereof, so as to further regulate motor carriers transporting property for hire over the public highways; defining the terms 'person,' 'Commission,' 'Highway Commission,' 'public highway,' 'certificate,' 'permit,' 'motor carrier,' and 'contract carrier'; placing all motor carriers under the jurisdiction of the Railroad Commission of the State of Texas; providing that no motor carrier shall hereafter operate as a common carrier without having a certificate of convenience and necessity and that no motor carrier shall hereafter operate as a contract carrier without having a permit; giving to the Railroad Commission of the State of Texas power and imposing upon it the duty to fix, prescribe or approve maximum or minimum or maximum and minimum rates, fares and charges for motor carriers doing business as common carriers and minimum rates, fares and charges for motor carriers operating as contract carriers, to require all motor carriers to keep certain accounts and to file such reports as the Commission may deem necessary, to require each operator of a motor-propelled vehicle operated by a motor carrier to have a driver's license, and prescribing fees therefor, and to regulate motor carriers in all other matters affecting their relationship with the shipping public, and so as to relieve existing and future undue burdens on the highways; making it unlawful for a motor carrier to operate a motor-propelled vehicle unless such vehicle is operated by a driver holding an unrevoked and uncancelled license issued by the Commission; giving the Commission the power and imposing upon it the duty to approve or disapprove the nature and character of equipment used and the amount and character of tonnage carried and the number, size and method of loading containers of any commodity carried on any vehicle operated by a motor carrier under a permit or certificate; providing for the sale, lease, assignment or transfer of certificates under certain conditions and subject to the approval or

disapproval of the Commission; prescribing the length of time a motor carrier may require or permit any driver or helper to remain on continuous duty with exception in cases of a certain specified emergency and providing venue for prosecution for violations of this provision; providing for the carrying and displaying of identification cards setting out the certificate or permit number and certain other information in the cab of each motor vehicle operated under this act, and making it unlawful to display such card or other insignia of authority from the Commission after the same has expired or been cancelled; providing the method for securing of certificates of convenience and necessity and permit, the requisites of applications therefor, for hearing on said applications, for the summoning of, the attendance of, the examining of and the fees for witnesses, for the filing of written opinions by the Commission in contested hearings, and giving the Commission power under certain conditions to revoke, suspend or amend any certificate or permit and providing for appeals from the decisions of the Railroad Commission of the State of Texas; providing the method for securing of certificates and permits by motor carriers lawfully operating under the present law; providing that no permit shall be granted to any person holding a permit and that no vehicle shall be operated with both a permit and a certificate; providing for the issuance of special permits to persons engaged in transporting certain specified commodities; providing for the issuance of special identification plates for motor carrier vehicles, and prescribing fees therefor; providing for the payment of annual fees for each motor vehicle operated by a motor carrier for the creation of a fund for administering the act; providing that no person now lawfully authorized to operate as a motor carrier under the present law and who has paid annual fees for the year ending September 1, 1931, shall be required to pay any additional fees; providing a portion from sales of certificates shall go to the State Treasurer for the benefit of the State Highway Fund; appropriating a fund for the administration of the act in the event revenues from licenses and fees are insufficient for that purpose; requiring that, before any certificate or per-

mit shall be issued and before any motor carrier may lawfully operate, such motor carrier shall file with the Commission bonds and insurance policies covering loss or damages from personal injury or loss of or injury to property and containing certain designated terms, and providing that any permit will automatically expire if such insurance is not kept in force, and providing that each motor carrier shall protect his employes by taking out workmen's compensation insurance; giving any authorized inspector for the Commission power and authority to make arrests for violations of this act; making the violation of any provision of the act or any lawful ruling or order of the Commission a misdemeanor and imposing a penalty, and, in addition, providing for the recovery of penalties by the State for the violation of any provision of this act or for the violation of any lawful rule or order of the Commissioner; providing for the remedy or injunction to enforce the act; making the giving or receiving of any commission or other consideration as an inducement to secure the transportation of property by motor carrier a misdemeanor and imposing a penalty; making the giving of any common carrier or the receiving by any shipper of any rebate, directly or indirectly, a misdemeanor and imposing a penalty; making the charging, demanding, contracting for, collecting or receiving by any motor carrier operating as a contract carrier, of a less compensation for any service than is prescribed therefor by the Commission or the procuring, aiding or abetting any contract carrier in so doing a misdemeanor and imposing a penalty; declaring the public policy of this State with reference to the business of transporting property for hire by means of motor vehicles over the highways of this State and declaring that the business of a motor carrier is impressed with the public interest; repealing all laws and parts of laws in conflict herewith; providing that if any part of this act is declared unconstitutional such decision shall not affect the validity of the remaining portions of the act and declaring an emergency."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. That Section 1 of Chapter 314, General Laws of the State of Texas, Forty-first Legislature, Regular Session, as amended by Chapter 24 of the General Laws of the Second Called Session thereof, regulating motor carriers transporting property over public highways, be and the same is hereby amended to read as follows:

SECTION 1. Definitions.—When used in this act unless expressly stated otherwise:

"(a) The term 'person' means and includes an individual, a firm, copartnership, corporation, company, an association or a joint stock association.

"(b) The term 'Commission' means the Railroad Commission of the State of Texas.

"(c) The term 'Highway Commission" means the Board of Highway Commissioners of the State of Texas.

"(d) The term 'public highway' means every street, road or highway in this State.

"(e) The term 'certificate' means certificate of public convenience and necessity issued under this act.

"(f) The term 'permit' means the permit issued to contract carriers under the terms of this act.

"(g) The term 'motor carrier' means any person, firm, corporation, company, copartnership, association or joint stock association, and their lessees, receivers or trustees appointed by any court whatsoever, owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term 'motor carrier' as used in this act shall not include, and this act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns.

"(h) The term 'contract carrier' means any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier."'

SEC. 2. That Section 2 of said chapter be and the same is hereby amended to read as follows:

"SECTION 2. No motor carrier, as defined in the preceding section, shall operate any motor-propelled vehicle for the purpose of the transportation or carriage of property for compensation or hire over any public highway in the State except in accordance with the provisions of this act; provided, however, that nothing in this act or any provisions thereof shall be construed or held to in any manner affect, limit or deprive cities and towns from exercising any of the powers granted them by Chapter 147, pages 307 to 318, inclusive, of the General Laws of the State of Texas, passed by the Thirty-third Legislature, or any amendments thereto."

SEC. 3. That Section 3 of the said chapter be and the same is hereby amended to read as follows:

"SECTION 3. No motor carrier shall, after this act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this act, a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity requires such operation. No motor carrier shall, after this act goes into effect, operate as a contract carrier without first having obtained from the Commission a permit so to do, which permit shall not be issued until the applicant shall have in all things complied with the requirements of this act."

SEC. 4. That Section 4 of said chapter be and the same is hereby amended to read as follows:

"SECTION 4 (a). The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property for compensation or hire by motor vehicle on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provisions herein contained, to prescribe all rules and regulations necessary for the government of motor carriers, to prescribe rules and regulations for the safety of operations of each of such motor carriers, to require the filing of such monthly, annual or other reports and oth-

er data of motor carriers as the Commission may deem necessary, to prescribe the schedules and services of motor carriers operating as common carriers, and to supervise and regulate motor carriers in all matters affecting the relationship between such carriers and the shipping public whether herein specifically mentioned or not.

"(b) The Commission is hereby vested with power and authority and it is hereby made its duty to require that each driver of a motor-propelled vehicle owned or operated by a motor carrier under the provisions of this act shall have a driver's license, which license shall be issued by the Commission pursuant to an examination testing the ability and fitness of the applicant and under such rules and regulations as the Commission may prescribe; provided, that every driver aforesaid shall acquire a driver's license within thirty (30) days after this act takes effect and shall annually thereafter on or before the anniversary of the date of the original license acquire a renewal thereof. Such license issued shall be for a term of one year. The Commission is empowered further to issue temporary licenses in case of emergency, for such term as the Commission may deem expedient; provided, such term shall not exceed ten (10) days and there shall be no right or privilege of renewal thereof. The Commission is hereby authorized to collect a fee of one dollar ($1.00) for each annual license fee or renewal. The Commission may suspend or revoke any such license for cause after notice and public hearing. It shall be unlawful for any motor carrier to operate a motor-propelled vehicle in this State unless such vehicle is operated by a driver holding an unrevoked and uncancelled license issued by the Commission.

"(c) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the shipping public that may be necessary in the interest of the public.

"(d) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters whether specifically mentioned herein or not so as to carefully preserve, foster and regulate transportation and to relieve the existing

and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interests of the public.

"The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the condition of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the commissioners courts of the several counties and to the recommendations of the local government of any municipality through or between which motor carriers operate."

SEC. 5. That Section 5 of said chapter be, and the same is hereby, amended to read as follows:

"SEC. 5. No motor carrier shall hereafter operate as a common carrier for the transportation of property for compensation or hire over the public highways of this State without first having obtained from the Commission, under the provisions of this Act, a certificate declaring that the public convenience and necessity requires such operation; provided, however, the Commission shall, without application or hearing when this Act goes into effect, issue all motor carriers then operating lawfully under permanent certificates of public convenience and necessity heretofore issued to them, certificates in lieu of the certificates issued under the terms of the former law covering the same routes that said common carrier shall have been operating over, and no more.

"Any certificate held, owned or obtained by any motor carrier operating as a common carrier under the provisions of this Act may be sold, assigned, leased, transferred or inherited; provided, however, that any proposed sale, lease, assignment or transfer shall be first presented in

writing to the Commission for its approval or disapproval, and the Commission may disapprove such proposed sale, assignment, lease or transfer if it be found and determined by the Commission that such proposed sale, assignment, lease or transfer is not in good faith or that the proposed purchaser, assignee, lessee or transferee is not able or capable of continuing the operation of the equipment proposed to be sold, assigned, leased or transferred in such manner as to render the services demanded by the public necessity and convenience on and along the designated route, or that said proposed sale, assignment, lease or transfer is not best for the public interest; the Commission in approving or disapproving any sale, assignment, lease or transfer of any certificate, may take into consideration all of the requirements and qualifications of a regular applicant required in this act and apply same as necessary qualifications of any proposed purchaser, assignee, lessee or transferee; provided, however, that in case a certificate is transferred that the transferee shall pay to the Commission a sum of money equal to ten per cent (10%) of the amount paid as a consideration for the transfer of the certificate, which sum of ten per cent (10%) shall be deposited in the State Treasury to the credit of the highway fund of the State; provided further, that any certificate obtained by any motor carrier or by any assignee or transferee shall be taken and held subject to the right of the State at any time to limit, restrict or forbid the use of the streets and highways of this State to any holder or owner of such certificate. Every application filed with the Commission for an order approving the lease, sale or transfer of any certificate of convenience and necessity shall be accompanied by a filing fee in the sum of twenty-five dollars ($25.00) which fee shall be in addition to the other fees and taxes and shall be retained by the Commission whether the lease, sale or transfer of the certificate of convenience and necessity is approved or not."

Section 6. That Section 6 of said chapter be and the same is hereby amended so as to read as follows, and the same is hereby further amended by adding Section 6 aa, Section 6 bb, and Section 6 cc.

"SECTION 6. (a) No motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall so operate until it shall have received a permit from the Commission to engage in such business and such permit shall not be issued until the applicant shall have in all things complied with the requirements of this act; nor shall such permit be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier. The Commission shall have the power to suspend for ten (10) days any existing permit after notice and hearing and to revoke any existing permit when it appears that such permit holder has disobeyed or violated any provisions of this act or of general laws regulating motor vehicles or violated any rule or regulation of the Commission authorized by this act.

"(b) No application for a permit shall be considered by the Commission unless it be reduced to writing and set forth the following facts:

"(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

"(2) The application shall set forth the nature of the transportation in which the applicant wishes to engage, stating substantially the territory to be covered by the operation, and including the condition and character of the roads over which the transportation is to be performed.

"(3) It shall give a description of each vehicle which the applicant intends to use, including weight and size of vehicle and its carrying capacity.

"(c) No application for permit shall be granted by the Commission until after a hearing nor shall any such permit be granted if the Commission shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory; provided, however, any person now lawfully operating as a Class 'B' operator in this State who may desire to continue in the business of a motor carrier shall file an application for a permit or

certificate under the terms of this act within thirty (30) days after the effective date hereof, and it shall be the duty of the Commission to determine such applications forthwith and such applicants may, subject to the provisions of this Act and to the orders, rules, rates and regulations of the Commission continue to operate as motor carriers pending the determination by the Commission of such application.

"(d) The Railroad Commission is hereby given authority to issue upon application to those persons who desire to engage in the business of transporting for hire over the highways of this State livestock, mohair, wool, milk, livestock feedstuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain special permits upon such terms, conditions and restrictions as the Railroad Commission may deem proper, and to make rules and regulations governing such operations keeping in mind the protection of the highways and the safety of the traveling public; provided, that if this act or any section, sub-section, sentence, clause or phrase thereof, is held unconstitutional and invalid by reason of the inclusion of this sub-section, the legislature hereby declares that it would have passed this act and any such section, sub-section, sentence, clause or phrase thereof without this sub-section."

"Section 6 aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.

"Section 6 bb. No application for permit to operate as a contract carrier shall be granted by the Commission to any person operating as a common carrier and holding a certificate of convenience and necessity, nor shall any application for certificate of convenience and necessity be granted by the Commission to any person operating as a contract carrier nor shall any vehicle be operated by

any motor carrier with both a permit and a certificate.

"SECTION 6 cc. No motor carrier operating in whole or in part in this State under a certificate or permit issued by the Railroad Commission of Texas, or any officer or agent of such motor carrier, shall require or knowingly permit any truck driver or his helper to drive or operate a truck for a period longer than fourteen (14) consecutive hours; and whenever such driver or helper shall have been continuously on such duty for fourteen (14) hours, he shall be relieved and shall not be required or knowingly permitted to again go on duty until he has had at least eight (8) consecutive hours off duty; and no such driver or helper who has been on such duty fourteen (14) hours in the aggregate in any twenty-four (24) hour period shall be required or knowingly permitted to continue or again go on duty without having had at least eight (8) consecutive hours off duty; and venue for prosecution under this section shall lie in the county of the residence of the defendant; provided, that in cases of emergency caused by the act of God, the foregoing restrictions as to hours shall not apply."

SEC. 7. That Section 7 of said chapter be and the same is hereby amended to read as follows:

"SECTION 7. For the purpose of defraying the expenses of administering this act every motor carrier operating as a contract carrier shall, at the time of the issuance of a permit to him and annually thereafter on or between September 1st and September 15th of each calendar year pay a special fee of ten dollars (10) for each motor vehicle operated or to be operated by such motor carrier. If the permit herein referred to is issued after the month of September of any year the fee paid shall be prorated to the remaining portion of the year ending August 31st following, but in no case less than one-fourth (¼) the annual fee. Provided, that no person now authorized by law to operate as a Class 'A' or Class 'B' motor carrier, and who has paid annual vehicle fees required by law of the holders of certificates or permits for the year ending September 1, 1931, shall be required to pay any additional vehicle fees or additional fees incident to the issuance of certificates or permits required in this act, for the year

ending September 1, 1931, in lieu of those now required by law. Every application for a permit shall be accompanied by a filing fee in the sum of ten dollars ($10.00) which fee shall be in addition to other fees and taxes and shall be retained by the Commission whether the permit be granted or not."

SECTION 8. That Section 8 of said chapter be and the same is hereby amended to read as follows:

"SECTION 8. The Commission is hereby vested with power and authority, and it is hereby made its duty upon the filing of an application for a certificate of public convenience and necessity to ascertain and determine under such rules and regulations as it may promulgate, after considering existing transportation facilities, and the demand for, or need of additional service, if there exists a public necessity for such service, and if public convenience will be promoted by granting said application and permitting the operating of motor vehicles on the highways designated in such application as a common carrier for hire."

SEC. 9. That Section 9 of said chapter be and the same is hereby amended to read as follows:

"SECTION 9. The Commission shall ascertain and determine if a particular highway or highways designated in an application for a certificate of public convenience and necessity are of such type of construction or in such state of repair, or subject to such use as to permit of the use sought to be made by the applicant, without unreasonable interference with the use of such highways by the general public for highway purposes. And if the Commission shall determine, after hearing, that the service rendered by existing transportation facilities or agencies is reasonably adequate, or that public convenience would not be promoted by granting of said application, and the operation of motor vehicles on the public highways therein designated, or that such highway or highways are not in such state of repair, or are already subject to such use as would not permit of the use sought to be made by the applicant without unreasonable interference with the use of such highways by the general public for highway purposes, then in either or any of such events, said application may be denied and said certificate refused, otherwise the ap-

plication shall be granted and the certificate issued upon such terms and conditions as said Commission may impose and subject to such rules and regulations as it has or may thereafter prescribe.

"In determining whether or not a certificate should be issued to a motor carrier, the Commission shall give weight and due regard to:

"(1) Probable permanence and the quality of service offered by the applicant.

"(2) The financial ability and responsibility of the applicant and its organization and personnel.

"(3) The character of vehicles and the character and location of depots or termini proposed to be used.

"(4) The experience of the applicant in the transportation of property and the character of the bond or insurance proposed to be given to insure the protection of the public."

SEC. 10. That Section 10 of said chapter be and the same is hereby amended to read as follows:

"SECTION 10. No application for a certificate of public convenience and necessity shall be considered by said Commission unless it be in writing and set forth the following facts:

"(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

"(2) The complete route or routes over which the applicant desires to operate, together with the description of each vehicle which the applicant intends to use.

"(3) A proposed schedule of service and a schedule of rates to be charged between the several points or localities to be served.

"(4) It shall be accompanied by a plat or map showing the route or routes over which the applicant desires to operate, on which plat or map shall be delineated the line or lines of any existing transportation company or companies serving such territory, and shall point out the inadequacy of existing transportation facilities or service, and shall specify wherein additional facilities or service

are required and would be secured by the granting of said application.

"The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the condition of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the commissioners courts of the several counties and to the recommendations of the local government of any municipality through or between which motor carriers operate."

SEC. 11. That Section 11 of said chapter be, and the same is hereby, amended to read as follows:

"SEC. 11. Upon the filing of said application for a certificate or permit, the Commission shall fix a time and place for hearing, and the place of hearing shall be in the city of Austin, Texas, unless otherwise ordered by the Commission. Notice of the filing of said application, and the time and place of hearing, shall be given by mail not less than ten (10) days, exclusive of the day of mailing, before such hearing, addressed to the owner or owners of existing transportation facilities serving such territory as applicant seeks to serve, as well as to the Highway Commission of the State of Texas, the county judge or judges of the counties and to the mayor of any incorporated city or town through which such carrier seeks to operate."

SEC. 12. That Section 12 of said chapter be, and the same is hereby, amended to read as follows:

"SECTION 12. (a) The hearing on an application for certificate or permit shall be conducted under such rules and regulations as the Commission may prescribe, and the parties interested, including the Highway Commission of this State, may appear either in person or by counsel and present such evidence and argument as they may de-

sire and as the Commission may deem pertinent in favor of or against the granting of such application. It shall be the duty of the Highway Commission, upon request of the Commission, to furnish information relating to the highway or highways designated in such application, as well as such other information as the Commission may deem pertinent to the hearing. After hearing and such investigation as the Commission may make, it shall be the duty of the Commission to grant or refuse the application, and, in any contested hearing, the Commission shall, along with its order, file a concise written opinion setting forth the facts and grounds for its action, and such opinion shall be admissible as evidence on any appeal taken therefrom; upon request of any party at interest in a contested hearing of any nature, the proceedings shall be taken down and reported by a reporter under the direction of the Commission.

"(b) The Commission at any time after hearing had, upon notice to the holder of any certificate or permit and after opportunity given such holder to be heard, may by its order revoke, suspend or amend any certificate or permit issued under the provisions of this act wherein such hearing the Commission shall find that such certificate or permit holder has discontinued operation or has violated, refused or neglected to observe the Commission's lawful orders, rules, rates or regulations or has violated the terms of said certificate or permit; provided, that the holder of such certificate or permit shall have the right of appeal as provided in this act."

SEC. 13. That Section 13 of said chapter be, and the same is hereby, amended to read as follows:

"SEC. 13. Before any permit or certificate of public convenience and necessity may be issued to any motor carrier, and before any motor carrier may lawfully operate under such permit or certificate, as the case may be, such motor carrier shall file with the Commission bonds and insurance policies issued by some insurance company, including mutuals and reciprocals or bonding company authorized by law to transact business in Texas, in an amount to be fixed by the Commission under such rules and regulations as it may prescribe, which bonds and insurance

policies shall provide that the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carrier so filing said insurance policies and bonds, based on claims for loss or damages from personal injury or loss of, or injury to, property occurring during the term of said bonds and policies and arising out of the actual operation of such motor carrier, and such bonds and policies shall also provide for successive recoveries to the complete exhaustion of the face amount thereof, and that such judgments will be paid by the obligor in said bonds and insurance policies irrespective of the solvency or insolvency of the motor carriers; provided, however, such bonds and policies shall not cover personal injuries sustained by the servants, agents or employes of such motor carrier; provided further, that in the event the insured shall abandon his permit or certificate and leave the State, a claimant, asserting a claim within the provisions of said bonds or policies, may file suit against the company executing such bond or policies in a court of competent jurisdiction without the necessity of making the insured a party to said suit. Provided, however, that the Commission shall not require insurance covering loss of or damage to cargo in amount excessive for the class of service to be rendered by any motor carrier. Each such motor carrier shall, on or before the date of the expiration of the term of any policy or bond so filed by him, file a renewal thereof, or new bonds and policies, containing the same terms and obligations of the preceding bonds and policies, and shall each year thereafter on or before the expiration date of the existing bonds and policies, file such renewal policies and bonds so as to provide continuous and unbroken protection to the public having claims against such motor carrier, and in the event such renewal bonds and policies are not so filed, the permit or certificate of public convenience and necessity of such motor carrier shall automatically expire and cease to exist.

"Each motor carrier shall also protect his employes by taking out workmen's compensation insurance, either as provided by the Workmen's Compensation Laws of the State of Texas, or in a reliable insurance company author-

ized to write workmen's compensation insurance approved by the Commission."

SEC. 14. That Section 13a of said chapter be, and the same is hereby amended to read as follows:

"SEC. 13a. The Commission is vested with power and authority, and it is hereby made its duty, to approve or disapprove the nature and character of the equipment to be used under any permit or certificate and the amount and character of tonnage which may be hauled thereunder on any motor vehicle, trailer or semi-trailer used under such permit or certificate, and in approving the amount and character of tonnage to be hauled on any such vehicles, trailers or semi-trailers under any permit or certificate, it may fix the number and size of boxes, packages, barrels or bales of any particular commodity to be transported on any such vehicles, trailers or semi-trailers, under such permit or certificate, and the method of loading such boxes, packages, barrels or bales of such commodity on the motor vehicles, trailers and semi-trailers to be used under such permit or certificate; provided, however, said Commission shall not authorize the use of any equipment of greater dimensions than otherwise permitted by law, nor any tonnage of greater weight than otherwise permitted by law.

"Provided, that if this section is for any reason held to be unconstitutional and invalid, such decision shall not affect the validity of the remaining portions of this act, and the legislature hereby declares that it would have passed this act and each section, sub-section, sentence, clause or phrase thereof, irrespective of the fact that this section be declared unconstitutional; provided further, that if this act or any section, sub-section, sentence, clause or phrase thereof is held to be unconstitutional and invalid by reason of the inclusion of this section, the legislature hereby declares that it would have passed this act and any such section, sub-section, sentence, clause or phrase thereof without this section."

SEC. 15. That Section 13a of said chapter be, and the same is hereby, further amended by adding thereto the following section, to be known as Section 13b:

"SECTION 13b. The Commission is hereby vested with

power and authority and it is hereby made its duty to require all motor carriers to keep a set of accounts strictly in accordance with such classification of accounts and rules in respect thereto as may be established by the Commission and to file reports and such other data as the Commission may deem necessary, and which said accounts shall be open to the inspection of the Commission or its representatives at all times."

SEC. 16. That Section 15 of said chapter be and the same is hereby amended, by adding thereto the following section to be known as Section 15a:

"SECTION 15a. Provided that any motor carrier at interest in any hearing may submit to the Commission the names and addresses of witnesses which he or it desires to use in such hearing, and it shall be the duty of the Commission to summon such witnesses."

SEC. 17. That Section 16 of said chapter be, and the same is hereby amended to read as follows:

"SECTION 16. (a) Every officer, agent, servant, or employe of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand, or requirement of the Commission shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00), and the violations occurring on each day shall constitute a separate offense.

"(b) Every officer, agent, servant, or employe of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand or requirement of the Commission, shall pay a penalty not exceeding one hundred dollars ($100.00) for each and every day of such violation. Such penalty shall be recovered in any court of competent jurisdiction in the county in which the violation occurs. Suit for such penalty or penalties shall be instituted and conducted by the Attorney General of the

State of Texas, or by the county or district attorney in the county in which the violation occurs in the name of the State of Texas.

"(c) Upon the violation of any provision of this act, or upon the violation of any rule, regulation, order or decree of the Commission promulgated under the terms of this act, any district court of any county where such violation occurs shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this act or from further violating any of the rules, regulations, orders and decrees of the Commission. Such injunctive relief may be granted upon the application of the Commission, the Attorney General or any district or county attorney. No bond shall be required when such injunctive relief is sought upon the application of the Commission, Attorney General or any district or county attorney. Such relief may be granted in suits for penalties as provided in subdivision (b) of this section, but a suit for penalty shall not be a condition precedent to the injunctive relief provided by this subdivision.

"(d) Any authorized inspector for the Commission shall have the power and authority to make arrests for any violations of this act and it shall be the duty of all judges, prosecuting attorneys and peace officers of the counties and municipalities of this State to assist in the enforcement of this act.

"(e) The Commission shall prescribe an identification card which must be displayed within the cab of each motor vehicle, setting out the certificate or permit number and the route or territory over which the vehicle is authorized to operate, giving the name and address of the owner of said certificate or permit. It shall be unlawful for the owner of said certificate or permit, his agent, servant or employe, or any other person to use or display said identification card after said certificate or permit has been cancelled or disposed of. The identification card provided for herein may be in such form and contain such information as required by the Railroad Commission.

"(f) It shall be unlawful for any owner of a certificate or permit, his agent, servant or employe, to display upon any motor vehicle the certificate or permit number, or

other insignia of authority from the Railroad Commission after said certificate or permit has expired, or has been cancelled.

"(g) It shall be unlawful for any motor carrier (common or contract), or the owner of a certificate or permit, or his agent, servant or employe, directly or indirectly, to offer, permit or give to any person, directly or indirectly, any commission or other consideration to induce such person to deliver to such motor carrier or certificate or permit owner, property to be transported; and it likewise shall be unlawful for any shipper or consignee or his agent, servant or employee, to receive from such motor carrier, directly or indirectly, any such commission or consideration as an inducement to secure the transportation of any such property. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not to exceed two hundred dollars ($200), and each such transaction shall constitute a separate offense.

"(h) Any common carrier motor carrier, his agent, servant or employe who directly or indirectly gives to any shipper any rebate, or any shipper, his agent, servant, or employe who directly or indirectly receives any rebate, shall be guilty of a misdemeanor, and shall be punished by a fine not to exceed two hundred dollars ($200.00) for each offense, in any court of competent jurisdiction in this State. It being the intention of this act that such motor carriers shall in every instance collect and receive, and the shipper shall pay, only the rate or fee prescribed or approved by the Commission.

"(i) If any motor carrier, or any officer, agent, clerk, servant, or employe, or receiver, or his agents, servants, or employe, of any motor carrier operating as a contract carrier in this State, shall, directly or indirectly, or by any special rate, rebate, drawback, or other device, for or on behalf of such contract carrier, knowingly charge, demand, or contract for, collect or receive from any person, firm or corporation a less compensation for any service rendered or to be rendered by any such contract carrier than is prescribed for said service, by said Commission, such contract carrier or any officer, clerk, servant, or em-

ployе or receiver, his agents, servants, or employe of such contract carrier shall be guilty of a misdemeanor, and, upon conviction shall be fined in a sum not to exceed two hundred dollars ($200.00) for each offense; and every person who violates or fails to comply with, or procures, aids or abets any contract carrier in the violation of the provisions hereof, shall likewise be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than two hundred dollars ($200.00) for each offense."

SEC. 18. That Section 17 (a) of said chapter be and the same is hereby amended to read as follows:

"SECTION 17. (a) For the purpose of defraying the expense of administering this act, every common carrier motor carrier now regularly operating, or which shall hereafter regularly operate in this State, shall at the time of the issuance of a certificate of convenience and necessity, unless otherwise provided herein, and annually thereafter, on or between September 1st and September 15th of each calendar year, pay a special fee of ten dollars ($10.00) for each motor propelled vehicle operated or to be operated by such motor carrier in the carriage of property. If the certificate of convenience and necessity herein referred to is issued after the month of September of any year the fee paid shall be prorated to the remaining portion of the year ending August 31st following, but in no case less than one-fourth (¼) the annual fee. In case of emergency or unusual temporary demands for transportation the fee for additional motor propelled vehicles for less period shall be fixed by the Commission in such reasonable amounts as may be prescribed by general rule or temporary order. Every application for a certificate of convenience and necessity shall be accompanied by a filing fee in the sum of twenty-five dollars ($25.00), which fee shall be in addition to other fees and taxes, and shall be retained by the Commission whether the certificate of convenience and necessity be granted or not."

SEC. 19. That Section 18 of said chapter be and the same is hereby amended to read as follows:

"SECTION 18. It shall be unlawful for any motor carrier as hereinbefore defined to operate any motor vehicle within this State unless there shall be displayed and firmly

fixed upon the front and rear of such vehicle an identification plate to be furnished by the Commission. Each of such plates shall be designed so as to identify the vehicle on which the same is attached as being a vehicle authorized to operate under the terms of this law; said plate shall bear the number given to the vehicle by the Commission and such other marks of identification as may be necessary. The plates for common carrier vehicles and the plates for contract carrier vehicles shall be different in design. The identication plates provided for herein shall be in addition to the regular license plates required by law. It shall be the duty of the Commission to provide these plates and each motor vehicle operating in this State shall display such plates as soon as the same are received, and such plates shall be issued annually thereafter and attached to each motor vehicle not later than September 1st of each year, or as soon thereafter as possible. The Commission shall be authorized to collect from the applicant a fee of one dollar ($1.00) for each pair of plates so issued, and all fees for such plates shall be deposited in the State Treasury to the credit of the 'Motor Carrier Fund'."

SEC. 20. That Section 19 (a) and (b) of said chapter be and the same is hereby amended to read as follows:

"SECTION 19. (a) The Commission shall have power to employ and appoint from time to time such experts, assistants, and other help, in addition to its present force, as may be deemed necessary to enable it at all times to properly administer and enforce this act. Such persons and employes of the Commission shall be paid for the service rendered such sums as may be fixed and prescribed by the Commission in monthly installments, and no employe of the Commission shall ask or receive any fee from any person for the taking of acknowledgments or any other service except as herein provided, and such salaries, wages and all fees that may be paid to witnesses and officers shall be paid out of the Motor Carrier Fund by the State Treasurer on warrants of the Comptroller of Public Accounts on order of voucher approved by the Commission or the chairman thereof. All actual and necessary traveling expenses of the members of the Commission and em-

ployes shall also be paid out of said fund in the same manner as salaries, wages and fees when such accounts shall have been itemized and sworn to by the Commission or employe incurring the expenses and approved by the Commission or the chairman thereof.

"(b) If the amount of total fees collected under the provisions of this act shall not be sufficient during any annual period to pay such salaries, costs, charges, fees and expenses, then the deficit shall be paid by the State Treasurer out of any fund not otherwise appropriated. Until sufficient funds have accrued to said Motor Carrier Fund for the payment of expenses, fees, etc., as provided herein, said expenses shall be paid by the State Treasurer out of any funds not otherwise appropriated, such sum to be paid out of the general revenue not to exceed the sum of five thousand dollars ($5000.00) and said sum is hereby appropriated. Any surplus remaining in the Motor Carrier Fund at the end of any fiscal year, after paying such salaries, accounts, fees and charges and after deducting such amounts as may be contracted to be paid and incurred, and such sums as may be reasonably estimated by the Commission for its use pending further collection of fees, shall be paid over to the general revenue fund."

Sec. 21. That Section 22 of said chapter be and the same is hereby amended, by adding thereto a new section, to be known as Section 22b, to read as follows:

"Sec. 22b. Declaration of Policy.—The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways, and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the neces-

sity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public."

SEC. 22. All laws and parts of laws in conflict herewith are hereby expressly repealed. Provided, however, that nothing in this act shall be construed as giving legislative sanction to any act that would violate the provisions of the Anti-Trust Laws of Texas.

SEC. 23. If any section, subsection, clause, sentence or phrase of this act is for any reason held to be unconstitutional and invalid, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause or phrase thereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional.

SEC. 24. The fact that there is at this time a large number of individuals, firms and corporations using the highways of this State for the transportation of property for hire by motor propelled vehicles, and the further fact that the present law does not effectively regulate this extensive business, and the fact that no law adequately protects the public in its dealings with such carriers, and in its use of the highways, creates an emergency and a public necessity requiring the suspension of the constitutional rule which requires all bills to be read in each House on three several days, and that such rule be, and the same is hereby, suspended, and that this act shall take effect from and after its passage, and it is so enacted.

APPENDIX "B"

IN THE

District Court of the United States

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. H. STEPHENSON ET AL., Complainants,

vs.

T. BINFORD ET AL., Respondents.

EQUITY No. 479

ASSIGNMENTS OF ERROR

Urged by Complainant and Complainant-Intervenors

In and to Said Honorable Court:

Come now J. H. Stephenson, complainant in the above numbered and entitled cause, and W. S. Finnegan, P. E. Arnett, D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson, complainant-intervenors in said cause, and, as their grounds and reasons for appealing from the decree of the court entered on June 8, A. D. 1932, respectfully specify the following assignments of error:

I.

The court erred in holding that the requirements of House Bill No. 335, passed by the 1931 Legislature of Texas, are valid and constitutional, and that if complain-

ant and complainant-intervenors desired to conduct their business of transporting commodities as private contract carriers on the highways of the State of Texas, they must comply with all of the provisions of said Act.

II.

The court erred in holding that the Legislature of Texas had the right to deny to complainant and complainant-intervenors the right to operate their vehicles over the highways of the State of Texas as private contract carriers, if the Railroad Commission of Texas should be of the opinion that such operations of complainant and complainant-intervenors "will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory," as is provided in subdivision (c), Section 6 of House Bill 335, passed by the 1931 Legislature of Texas.

III.

The court erred in holding that the State of Texas had the right to deny unto complainant and complainant-intervenors the use of its highways for the purpose of operating upon same as private contract carriers, if complainant and complainant-intervenors did not comply with the orders of the Railroad Commission of Texas, fixing, prescribing or approving the maximum or minimum, or maximum and minimum rates, fares and charges for the transportation services rendered by them, as is provided for in subdivision (a) of Section 4 of said House Bill No. 335, passed by the 1931 Legislature of Texas.

IV.

The court erred in holding that complainant and complainant-intervenors, although private contract carriers, could be compelled by the State of Texas, through its Railroad Commission, to submit to the rates, fares and charges adopted and promulgated by said Commission, and that as an incident to the right of operation as contract carriers, complainant and complainant-intervenors must charge and receive rates in an amount equal to the

minimum rates, fares and charges prescribed for common carriers rendering substantially the same service, and no less.

V.

The court erred in holding that the State of Texas had the right and power to control and regulate the rates to be charged by complainant and complainant-intervenors, although they be private contract carriers, and that upon complainant's and complainant-intervenors' failure to charge the rates prescribed by the Railroad Commission, the State of Texas had the right to deny them the use of its highways,—all as is provided in House Bill No. 335, passed by the 1931 Legislature of Texas.

VI.

The court erred in holding that the State of Texas, through its Railroad Commission, could so control and regulate the charges made and moneys received by complainant and complainant-intervenors for transportation services rendered as purely private contract carriers, that if complainant or complainant-intervenors, directly or indirectly, or by any special rate, rebate, drawback, or other device, should charge, demand or contract for, collect or receive, a less compensation for any services rendered, or to be rendered, than is prescribed for said services by the Railroad Commission of Texas, they would be guilty of a misdemeanor and upon conviction would be subject to a fine not to exceed Two Hundred Dollars for each offense, as is provided in subdivision (i) of Section 17 of said House Bill 335, passed by the 1931 Legislature of Texas.

VII.

The court erred in holding that complainant and complainant-intervenors, although private contract carriers, could be compelled to carry insurance covering loss of or damage to cargo, as a prerequisite to receiving permission to operate their vehicles as such contract carriers over the highways of the State of Texas, as is prescribed in Section 13 of said House Bill 335.

VIII.

The court erred in holding that subdivision (d) of Section 6 of said House Bill 335, giving the Railroad Commission of Texas authority to issue upon application to those persons who desired to engage in the business of transporting for hire over the highways of the State of Texas, livestock, mohair, wool, milk, feedstuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain, special permits upon such terms, conditions and restrictions as the Railroad Commission may deem proper, and to make rules and regulations governing such operations,—keeping in mind the protection of the highways and the safety of the traveling public,—was not discriminatory against and did not deny to complainant and complainant-intervenors the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

IX.

The court erred in refusing to hold subsection (d) of Section 4 of said House Bill 335, passed by the 1931 Legislature of Texas, discriminatory against complainant and complainant-intervenors, and as denying to them the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that the operators of complainant's and complainant-intervenors' trucks are required to obtain drivers' licenses, whereas, persons, firms and corporations owning their own trucks and transporting their own commodities are not required to obtain licenses for the drivers operating their trucks over the highways of the State of Texas.

X.

The court erred in refusing to hold Section 6-cc of said House Bill 335, passed by the 1931 Legislature of Texas, discriminatory against complainant and complainant-intervenors, and as denying to them the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that by said provisions complainant and complainant-intervenors are pro-

hibited from permitting the operators of their trucks to drive said trucks for a period longer than prescribed therein, whereas, the many persons, firms and corporations owning their own*ing* trucks and transporting their own commodities are not required to abide by such regulation,—there being no reasonable basis for such a classification and discrimination.

XI.

The court erred in refusing to hold that Section 13 of said House Bill 335, passed by the 1931 Legislature of Texas, was discriminatory against and denied to complainant and complainant-intervenors the equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, in that said section compels complainant and complainant-intervenors to obtain certain policies of insurance before they can lawfully operate upon the highways of the State of Texas, and which said policies of insurance are not required for persons, firms and corporations owning and operating motor vehicles over the highways of the State of Texas, and transporting their own commodities, thus bringing about an arbitrary designation and pointing out of complainant and complainant-intervenors.

XII.

The court erred in holding that Section 14 of said House Bill 335, passed by the 1931 Legislature of Texas, was not discriminatory against and did not deny to complainant and complainant-intervenors the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that said section vests the Railroad Commission of Texas with power and authority, and makes it its duty, to approve or disapprove the nature and character of the equipment to be used under any permit or certificate, and the amount and character of tonnage which may be hauled thereunder on any motor vehicle, trailer or semi-trailer used by complainant and complainant-intervenors, and to fix the number and size of boxes, packages, barrels or bales of any particular

commodity transported by them,—and which said regulations are not applied to or imposed upon persons, firms, or corporations operating trucks over the highways of the State of Texas in the carriage of commodities belonging to them.

XIII.

The court erred in holding that the State of Texas had the right to deny complainant and complainant-intervenors the use of the highways unless they obtained a permit, which is, under the provisions of House Bill 335, in effect a certificate of public convenience and necessity, unless complainant and complainant-intervenors submitted themselves to regulations and conditions which are unconstitutional, denying to complainant and complainant-intervenors the equal protection of the laws and depriving them of their property without due process of law, all in violation of the Fourteenth Amendment to the Constitution of the United States; and although the court be correct in saying that the right of complainant and complainant-intervenors to the use of the highways is a mere privilege (which is not admitted), the grant of the State of Texas to use them cannot be predicated and based upon unconstitutional conditions and regulations.

XIV.

The court erred in refusing to hold the provisions of said House Bill No. 335, passed by the 1931 Legislature of Texas, as applied to complainant and complainant-intervenors, an unwarranted and unjust interference with their private right of contract, and, accordingly, resulting in a deprivation of their property without due process of law.

XV.

The court erred in holding that as a matter of law House Bill No. 335, passed by the 1931 Legislature, and which bacame a law of the State of Texas on August 22, 1931, as construed and applied to complainant and complainant-intervenors, was a lawful and constitutional statute.

XVI.

The court erred in finding as a fact that: "The legislature, in effect, found that the regulation of the minimum rates of contract motor carriers is necessary in the public interest to conserve and maintain an adequate transportation system capable to serve the entire needs of the people of the State, and we think the evidence supports this finding" (Finding of Fact No. XII), for the reason that the same is an unwarranted conclusion on the part of the court, wholly unsupported by any evidence.

XVII.

The court erred in finding as a fact that: "The legislature has declared that all of the available carriage service, including common carriage by rail and road and contract carriage by road, are so inter-dependent that the public may not continue to have a safe and dependable transportation system unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulation bringing their service into relation with common carriers, and we find the evidence supports this finding" (Finding of Fact No. XXV), for the reason that this finding is an unwarranted conclusion by the court—there being no evidence in the record to support it.

XVIII.

The court erred in holding that: "The granting to the Commission of the power to grant or refuse a permit to a contract carrier upon a determination of whether the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory will be impaired, the power to fix minimum rates to be charged by contract carriers, which rates shall not be less than those charged common carriers for substantially the same service, the forbidding of rebate, and discrimination by contract carriers, and the requiring that contract carriers keep books of account and make reports to the Commission, are reasonable regulations reasonably designed to effect the State's declaration of purpose and

policy that the use of the highways by motor carriers for hire is a business affected with the public interest" (Finding of Fact XXVIII), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling said complainanat and complainant-intervenors to dedicate their property to a quasi public use, and is in effect converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XIX.

The court erred in holding that: "The legislature has declared that the business of operating as a motor carrier of property for hire along the highways of Texas is a business affected with the public interest, and we think the evidence not only does not overcome, but, on the contrary, supports this declaration" (Finding of Fact No. XXIX), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use, and is in effect converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XX.

The court erred in finding that: "We find that the legislature has found that this system of regulation is designed in the interest of public convenience, and that it will operate to bring highway order out of highway chaos, by preventing a further disintegration of the all but practically destroyed common carrier service on the road, and that the exercise of the powers which the act confers will not only protect the highways and the people on them from the

results of reckless and careless operations, but will give the whole people of the State a safe and dependable system of transportation for the carrying of their freight by highways. The legislature having so found, we find nothing in the evidence to overthrow the finding or to make it appear unreasonable" (Finding of Fact No. XXXII), for the reason that this finding is an unwarranted conclusion by the court.

XXI.

The court erred in holding that: "It is our opinion that the State has the power to, and it has declared that the business of operating for hire on the public roads of Texas is a business affected with the public interest, and that it may not be conducted except under legislative grant" (Conclusions of Law, I), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use, and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXII.

The court erred in holding that: "That it has the power to affix and it has affixed to the franchises which must be obtained in order to conduct the business, reasonable conditions" (Conclusions of Law, II), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a guasi public use, and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXIII.

The court erred in holding that: "That the legislature has not undertaken to convert private carriers into common carriers by any kind of fiat, and it has not imposed arbitrary restrictions upon the business of persons using the highways" (Conclusions of Law, III), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use, and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXIV.

The court erred in holding that: "That it merely has done what it has a right to do, asserted its will as to the conditions under which persons who use the public roads in the conduct of their business may obtain a franchise to use them, and that the exercise of such powers has not, in any manner, transgressed the Fourteenth Amendment" (Conclusions of Law, IV), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use, and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXV.

The court erred in holding that: "That the legislature has, by a comprehensive legislative program, consisting of the acts in question here, and other acts not now under review, undertaken to remedy the mischiefs incidental to

the unregulated use of the highways, and that the challenged act represents the reasonable exertion of the State's power over its highways and over those who use them to conduct their business thereon" (Conclusions of Law, V), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use, and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

In Addition to the Above Assignments of Error, Complainant-Intervenor D. A. Beard also Specifies the Following Assignments of Error.

XXVI.

The court erred in holding that the rate features of the act constituted highway regulation in any permissible sense of protecting the highways or the public upon the highways. Indeed, the rate feature of the act whereby a private contract carrier, such as intervenor for the Peden Company, must charge the common carrier rate, is in no sense highway regulation for the protection of either the highways or the public upon them, and has no relation to that end, but is purely arbitrary provision under the guise of highway regulation, in order to interfere with the rights of private contract in the interest of common carriers.

XXVII.

The court erred in holding that intervenor Beard holds himself out to the public for all the carriage upon the highways he may get to do, and in suggesting that there is "more than a little question" as to whether he is not a common carrier. Such a holding is wholly gratuitous and

without basis of fact, and without a scintilla of evidence to support it. On the direct contrary, the intervenor is seeking to protect by his intervention herein only his private contract with Peden Company under which he seeks alone to protect merely his right to do a portion of the private hauling of Peden Company between its warehouses and to make deliveries to a portion of its retail customers from time to time. Therefore, the statement of the court in its opinion is in serious error, and highly prejudicial, and the suggestion that he seeks herein under the form of a contract carrier to become a common carrier is without the slightest basis.

XXVIII.

Since there is nothing in the act under attack to prevent the Peden Company from transporting over the public highways of the State by motor vehicle its own commodities between its warehouses and to its customers, the Peden Company and intervenor constitutionally have the right to contract for intervenor to perform the service which Peden Company may under the act legally perform. The court, therefore, erred in holding that such contract between them may not be performed without a permit from the Railroad Commission, and only upon a finding by it that the performance of the same would not impair the efficient public service of any common carrier then adequately serving the same territory, and, moreover, that such transportation may not be performed unless the common carrier tariff is charged and paid.

XXIX.

The court erred in holding that the act does not apply to the use of roads for hire by individuals who are not in the general business or carriage for hire, but who as mere agents for another make a charge for hauling upon the highways, in the very face of the contrary language of the act itself which specifically makes all its provisions directly applicable to every person *"operating any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State,"*

except within incorporated cities or towns. The construction, therefore, which the court gives to the act to sustain its constitutionality is in the very teeth of the act itself.

WHEREFORE, complainant and complainant-intervenors pray that the decree of the court denying them the permanent injunction prayed for be in all things reversed, and that the temporary injunction prayed for by them be granted.

Attorneys for Complainant, J. H. Stephenson, and Complainant-Intervenors W. S. Finnegan and P. E. Arnett.

Attorneys for Complainant-Intervenors B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson.

Attorneys for Complainant-Intervenor D. A. Beard.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 326

J. H. STEPHENSON ET AL., APPELLANTS,

vs.

T. BINFORD ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES.

JAMES V. ALLRED,
Attorney General of Texas.
T. S. CHRISTOPHER,
Assistant Attorney General.
ELBERT HOOPER,
Assistant Attorney General.

CLAUDE POLLARD,
Austin, Texas,
J. H. TALLICHET,
Houston, Texas,
CHAS. C. HUFF,
Dallas, Texas,
W. M. STREETMAN,
Houston, Texas,
A. L. REED,
Dallas, Texas,
Of Counsel.

INDEX

	Page
Opinions	1
The Statutes and Questions Involved	2
Statement	13
Summary of Argument	24
Argument	27
I. The Act does not require appellants and others of their class to devote their property to any different or greater use than that to which they have devoted it themselves. It merely fixes reasonable regulations in the public interest and welfare upon purely permissive uses of public property as a place of business	27
II. The class of contract carriers who are reached by the act are, under the conditions now obtaining on the highways, engaged in a business which is affected with a public interest, and the reasonable regulation of their rates and practices is essential for the protection of that interest	40
(*a*) The nature and extent of the business of complainant and complainant-interveners	46
(*b*) Their public profession and the extent of their operations	51
(*c*) Kinds of traffic hauled	53
(*d*) Effect on railways	57
(*e*) Effect on common carrier truck lines	63
(*f*) Effect on shippers, commodities, and communities	67
(*g*) Business conditions	70
(*h*) Producers and interior markets	73
(*i*) Public interest generally	75
III. The Act imposes substantially different schemes of regulation upon common and contract carriers and there is a clear differentiation between the two classes. It authorizes no greater regulation of appellants' business than is essential to the accomplishment of the valid purposes of the act	83

Page

IV. Section 6(*d*) authorizing the issuance of special permits for the transportation of certain named commodities creates no unlawful discrimination because any person operating thereunder is subject to the regulations applicable to the class of which he is a member 91

(*a*) Event if Section 6(*d*) is not open to that construction, appellants are in no position to complain since they do not haul those commodities and have shown no injury..... 93

(*b*) The act is clearly severable, and if Section 6(*d*) is invalid, it, and not the act, must fall..... 95

V. The Act is not discriminatory as between carriers for hire and persons transporting their own property because the circumstances and conditions of operation are substantially dissimilar 97

Conclusion 99

TABLE OF CASES CITED.

Brass v. North Dakota, 153 U. S. 391.....25,26,35,41
Budd v. New York, 143 U. S. 517.....25,26,35,41 43
Buck v. Kuykendall, 267 U. S. 314.....32,33,78
Clark v. Poor, 20 Fed., (2d) 182..... 95
Chambers v. Baldwin, 274 S. W. 1011..... 96
Charlestown Natural Gas Co. v. Lowe (W. Va.), 44 S. E. 413 43
Coordination of Motor Transportation, 182 I. C. C. 263-430 23,26
Cotting v. Kansas, 183 U. S. 79..... 35
Doering v. Walters, 140 N. E. 74..... 95
Ex parte W. W. Sterling, et. al. (No. 6322, Sup. Ct. of Texas) 31
Ex parte Curly, 255 S. W. 730..... 95
Ex parte Wright, 82 Tex. Crim. Rep. 247..... 96
Ex parte Parr, 200 S. W. 404..... 96
Ex parte Towles, 48 Texas 413..... 96
Frost v. Commission, 271 U. S. 583..... 32,33
Frost v. Oklahoma, 274 U. S. 719..... 94
German Alliance Insurance Co., v. Lewis, 233 U. S. 389.. 25,26,35,43

Page

Gibbons v. Ogden, 9 Wheat 203-4 76
Goforth v. State, 241 S. W. 1027 96
Great Northern Ry. Co. v. United States, 218 Fed., 302 .. 95
Griffin v. State, 218 S. W. 494 96
Johnson v. Southern Tea Company, 196 U. S. 1 95
Keokee Coke Company v. Taylor, 234 U. S. 224 99
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 99
Lytle v. Halff, 12 S. W. 610 96
Michigan v. Duke, 266 U. S. 571 32,33,78
Miller v. Wilson, 236 U. S. 373 99
Munn v. Illinois, 94 U. S. 113 25,26,35,40
Packard v. Banton, 264 U. S. 140 32
People v. Budd, 117 N. Y. 1 41,43
Railway v. U. S., 232 Fed. 349 95
Railway Co. v. Voelker, 1932 Fed. 522 95
Russell v. State, 228 S. W. 566 96
Sage v. Baldwin, 55 Fed. (2d) 968 78,96
San Pedro R. R. Co. v. U. S., 213 Fed. 326 95
Scott v. State, 233 S. W. 1097 96
Schlemmer v. Buffalo R. R. Co., 205 U. S. 1 95
Southern Railroad Co. v. U. S., 222 U. S. 20 95
Smith v. Cahoon, 283 U. S. 553 26,27,32,33,92,99
Smith v. People, 51 Col. 270 95
Smith v. People 117 Pac. 612 95
Sproles v. Binford, 286 U. S. 374 ..... 14,25,26,27,29,32, 78,98,99
State v. Lipkin, 84 S. E. 340 95
Texas v. Eastern Texas R. R. Co., 258 U. S. 204 92,95
T. & N. O. R. R. Co. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548 78
U. S. v. Delaware & Hudson Co., 213 U. S. 366, 407-8 ... 92,95
White v. Maverick County, 35 S. W. (2d) 107 96
Williams v. Standard Oil Co., of Louisiana, 278 U. S. 241 27,96
Wolff Packing Company v. Court of Industrial Relations, 262 U. S. 522 26,45,46

OTHER AUTHORITIES.

Willoughby on Constitution of United States, Vol. 3, Sec. 1157, page 1749 40

STATUTES CITED.

Constitution of Texas:
Article 12, Section 3 77
Article 12, Section 5 77

Page

Chapter 282, Acts, 1931 98
Chapter 277, Acts, Forty-second Texas Legislature:
Sec. 1(*g*) 4
Sec. 1(*h*) 4
Sec. 6(*d*) 5
Sec. 3 6
Sec. 4 6
Sec. 6(*a*) 7
Sec. 6(*b*) 7
Sec. 6(*c*) 8
Sec. 6(*aa*) 6
Sec. 8 8
Sec. 9 8
Sec. 10 10
Sec. 13 11
Sec. 13(*b*) 11
Sec. 22(*b*) 2

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 326

J. H. STEPHENSON ET AL., APPELLANTS,

vs.

T. BINFORD ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES.

Opinions.

The opinion of the statutory three-judge court denying the temporary injunction (R. 129-142) is reported in 53 Federal (2d) 509, and the final opinion on the merits (R. 288) is not yet officially reported.

The Statutes and Questions Involved.

The Act in question (Chapter 277, 42nd Texas Legislature) was approved June 6, 1931. It is designed to regulate the use of the public highways by common and contract carriers for hire; it empowers the Railroad Commission of Texas to administer and supervise the enforcement of its provisions. It has the three-fold purpose of highway protection, traffic safety, and the maintenance of a coordinated transportation system by rail and highway.

The legislative purpose and policy is declared as follows:

> "SECTION 22*b*. Declaration of Policy.—The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways-and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may

serve the best interest of the general public." (R. 31-32.)

The validity of those provisions of the act which were adopted in the interest of traffic safety and highway protection are not here seriously questioned (R. 131-132). Briefly, they require licensed and competent drivers; limit the hours of continuous service for drivers; require carriers to secure the public against loss for personal injuries; authorize inspection of equipment used and approval or disapproval thereof; regulate the manner of loading, the size and character of packages, and the weight of loads; authorize the Commission to classify the highways with reference to traffic congestion, and their ability to withstand varying transportation uses, and vest the Commission with general supervision over the highways and the carriers using them in the interest of their preservation and public safety thereon.

The other provisions of the act relate to the Commission's supervision over the rates and service of carriers and their relationship to the shipping public; to the public convenience and necessity in case of common carriers and to the effect of proposed contract carrier operations upon the efficient public service of existing common carriers; to the Commission's power to prescribe maximum and minimum rates for common carriers and to fix the minimum rates of contract carriers operating in competition with common carriers; to the requirements for maps of the territory to be covered by proposed operations, showing existing transportation facilities; insurance; penalties for

violating rate orders; penalties for discriminatory rates and practices and rebates, and requirements for keeping of accounts, and reports on same to the Commission.

Appellants allege they are private contract carriers and that their business is wholly unaffected with the public interest. They make the oft repeated charge that the act undertakes to convert them into common carriers and that the burdens and duties imposed upon them by it are in no wise dissimilar from those it imposes upon common carriers. Hence both the common and contract carrier provisions should be considered.

The act makes it the duty of the Commission to regulate all "motor carriers." Section 1(*g*) defines the term "motor carrier" to mean "any person * * * operating * * * any motor propelled vehicle used in transporting property for compensation or hire over any public highway in this state, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; * * *." It does not apply to motor vehicles operated exclusively within the incorporated limits of cities and towns (R. 13).

Section 1(*h*) defines the term "contract carrier" to mean "any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier" (R. 13).

The act does not undertake to define the term "common carrier," leaving the determination of that ques-

tion to the Commission in each particular case as the facts may warrant.

Section 6(*d*) authorizes the Commission to issue to persons "who desire to engage in the business of transporting for hire over the highways of this State live stock, mohair, wool, milk, live stock feed stuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain, special permits upon such terms, conditions and restrictions as the Railroad Commission may deem proper, and to make rules and regulations governing such operations keeping in mind the protection of the highways and the safety of the traveling public; * * *" (R. 18).

Thus, the act divides persons transporting property for hire into two general classes. They are, first, common carriers, which includes all those whose operations bring them within the meaning of that term as it is understood and defined by the decisions of the courts; and, second, contract carriers composed of all persons hauling for hire, whose operations do not make them common carriers in fact. One operating under a special permit authorized by Sec. 6(*d*) is either a common or contract carrier, depending upon the nature of his operations. In either event he is subject to either common or contract carrier regulation under the act.

Motor carrier operations without a permit or certificate are prohibited by Section 3 in the following terms:

> "SECTION 3. No motor carrier shall, * * * operate as a common carrier without first having obtained from the Commission, * * * a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity requires such operation. No motor carrier shall * * * operate as a contract carrier without first having obtained from the Commission a permit so to do, which permit shall not be issued until the applicant shall have in all things complied with the requirements of this act" (R. 13-14).

Section 4 is a general grant of power and authority making it the Commission's duty to supervise and regulate the transportation of property for hire, to fix rates subject to specific provisions, and to adopt rules and regulations for the government of carriers and for safety of operations, and to supervise motor carriers in all matters affecting the relationship between them and the shipping public that may be necessary in the public interest (R. 14-15). In the case of common carriers the Commission is required to prescribe schedule and service regulations (R. 14).

The following section limits the Commission's power to prescribe rates for contract carriers:

> "SEC. 6*aa*. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to

be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service" (R. 19).

The following sections govern contract carrier applications:

"SECTION 6. (*a*) No motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall so operate until it shall have received a permit from the Commission to engage in such business and such permit shall not be issued until the applicant shall have in all things complied with the requirements of this act; nor shall such permit be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier. * * *

"(*b*) No application for a permit shall be considered by the Commission unless it be reduced to writing and sets forth the following facts:

"(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

"(2) The application shall set forth the nature of the transportation in which the applicant wishes to engage, stating substantially the territory to be covered by the operation and including the condition and character of the roads over which the transportation is to be performed.

"(3) It shall give a description of each vehicle which the applicant intends to use, including weight and size of vehicle and its carrying capacity.

"(*c*) No application for permit shall be granted by the Commission until after a hearing nor shall any such permit be granted if the Commission shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory; * * *" (R. 16-18).

Common carrier applications are governed as follows:

"SECTION 8. The Commission is hereby vested with power and authority, and it is hereby made its duty upon the filing of an application for a certificate of public convenience and necessity to ascertain and determine under such rules and regulations as it may promulgate, after considering existing transportation facilities, and the demand for, or need of additional service, if there exists a public necessity for such service, and if public convenience will be promoted by granting said application and permitting the operating of motor vehicles on the highways designated in such application as a common carrier for hire (R. 20).

"SECTION 9. The Commission shall ascertain and determine if a particular highway or highways designated in an application for a certificate of public convenience and necessity are of such type of construction or in such state of

repair, or subject to such use as to permit of the use sought to be made by the applicant, without unreasonable interference with the use of such highways by the general public for highway purposes. And if the Commission shall determine, after hearing, that the service rendered by existing transportation facilities or agencies is reasonably adequate, or that public convenience would not be promoted by granting of said application, and the operation of motor vehicles on the public highways therein designated, or that such highway or highways are not in such state of repair, or are already subject to such use as would not permit of the use sought to be made by the applicant without unreasonable interference with the use of such highways by the general public for highway purposes then in either or any of such events said application may be denied and said certificate refused, otherwise the application shall be granted and the certificate issued upon such terms and conditions as said Commission may impose and subject to such rules and regulations as it has or may thereafter prescribe.

"In determining whether or not a certificate should be issued to a motor carrier, the Commission shall give weight and due regard to:

"(1) Probable permanence and the quality of service offered by the applicant.

"(2) The financial ability and responsibility of the applicant and its organization and personnel.

"(3) The character of vehicles and the character and location of depots or termini proposed to be used.

"(4) The experience of the applicant in the transportation of property and the character of

the bond or insurance proposed to be given to insure the protection of the public (R. 20-21).

"SECTION 10. No application for a certificate of public convenience and necessity shall be considered by said Commission unless it be in writing and set forth the following facts:

"(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

"(2) The complete route or routes over which the applicant desires to operate, together with the description of each vehicle which the applicant intends to use.

"(3) A proposed schedule of service and a schedule of rates to be charged between the several points or localities to be served.

"(4) It shall be accompanied by a plat or map showing the route or routes over which the applicant desires to operate, on which plat or maps shall be delineated the line or lines of any existing transportation company or companies serving such territory, and shall point out the inadequacy of existing transportation facilities or service and shall specify wherein additional facilities or service are required and would be secured by the granting of said application.

"The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the conditions of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the

> Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the commissioners courts of the several counties and to the recommendations of the local government of any municipality through or between which motor carriers operate" (R. 21-22).

Both common and contract carriers are required by Section 13 to file with the Commission "bonds and insurance policies * * * in an amount to be fixed by the Commission * * * which * * * shall provide that the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carriers * * * based on claims for loss or damages from personal injury or loss of, or injury to, property occurring during the term of said bonds and policies and arising out of the actual operation of such motor carriers" * * *. Both are required to carry workmen's compensation insurance for the protection of their employees (R. 24-25).

Both classes of carriers are required by Section 13b:

> * * * "to keep a set of accounts strictly in accordance with such classification of accounts and rules in respect thereto as may be established by the Commission and to file reports and such other data as the Commission may deem necessary, and which said accounts

shall be open to the inspection of the Commission or its representatives at all times'' (R. 26).

The other provisions of the act relate to the manner of holding hearings, provide for its enforcement, fix the fees and prescribe penalties for violations (R. 26-30).

The questions raised by appellants' assignment of errors are:

1. Are its provisions tantamount to a requirement that they dedicate their property to the quasi public use before being permitted to operate as contract carriers over public highways? Even if the act has the effect claimed by appellants, does it necessarily follow, in view of all the circumstances surrounding their operations and others of their class, that its provisions are violative of the due process clause of the Constitution? (Assignment 1, R. 289).

2. Is there any sound basis for the contention that appellants' business is in no sense affected with a public interest? As a matter of law and fact, is it not reasonable to hold that contract carriage is now a business affected with a public interest, considering conditions which have developed within recent years on the public highways and which now obtain thereon, and considering further the destructive effect of such operations upon the industrial and economic life of the State, and with special emphasis upon the fact that they are making merely a permissive use of public property as a place of business? Even if their business is not so affected, as a matter of law, does the due

process clause operate so as to deny the State's power to enforce the regulations of the act in the public interest, and in preserving a dependable transportation system for the whole people? (Assignment 2, R. 289-290).

3. Does the act impose the same burdens upon contract and common carriers, and does it regulate the business of contract carriers in violation of the due process clause? (Assignment 3, R. 290-291).

4. Is the act subject to the construction that its provisions are not applicable to persons operating under special permits provided by Section 6(*d*) and, for that reason, discriminatory? Even if subject to such a construction, are appellants in a position to complain? (Assignment 4, R. 291).

5. Is the act discriminatory because it does not apply to persons transporting their own property over the highways in their own vehicles? (Assignment 5, R. 291).

In each instance the court below decided against the contention of the appellants and in favor of the validity of the law.

Statement.

Since we cannot agree with the inaccurate statements made by appellants concerning the nature and extent of their operations, the substance of the testimony of record or the effect of the various requirements of the act, we submit the following statement of the material matters involved:

"Faced with the grave necessity of adequately regulating motor traffic on the highways of Texas in the interest at once of the safety of the traveling public, the protection of the highways, and the maintenance of a safe and dependable transportation system, both by rail and by road for the people of the State, the Forty-second Legislature of Texas, at its regular session, enacted into law a legislative program designed and comprehensive enough to deal with and to remedy the mischiefs incident to unregulated use of the highways, including those arising from the unprecedented use of the highways by private contract carriers for hire." (Judge Hutcheson, in opinion denying temporary injunction, 53 Fed. (2d) 509, R. 129-130).

One phase of that program was before this Court in the case of *Sproles v. Binford*, 286 U. S. 374, decided May 23, 1932. That case sustained the act (Chapter 282, 42nd Legislature, 1931) which was designed primarily to protect the highways and remove traffic hazards. It limits the dimensions and loads of motor vehicles, regulates speed, brakes, and other appliances in the interest of safety, and applies generally to all persons operating trucks and busses over the highways.

It is important to note that the act under attack in the Sproles case, and that assailed in this case, were adopted as companion measures at the same legislative session. The latter was approved June 5, and the former on June 11, 1931. Since they were consid-

ered together, we may assume they represent that body's best judgment of the regulations necessary to solve the great problems with which it dealt.

This act seeks the solution of a problem which is far more complex and difficult than those we have mentioned. As we shall show, unregulated and unrestrained contract carrier operations had, within the short period of five or six years, all but destroyed the business of the common carrier truck lines; very seriously impaired the service of railways and greatly depleted their revenues; destroyed interior markets, and disturbed and injured business conditions generally with their discriminatory rates and practices.[1] Evidence of these evil consequences were plainly seen on all hands. (See digest of evidence, pages 46 to 76 of this brief.)

The court judicially knows that this perplexing problem is not peculiar to Texas. It has reviewed the legislative efforts of a number of states to solve it. The decisions of the courts show that many of the states have undertaken to meet similar situations but

---

[1] "To achieve the maximum benefits of the new facility consistent with a minimum degree of duplication of service, it is necessary that rail and motor competition be conducted under an equality of opportunity and that service which, upon comparison of delivery time and rates, is found to be a duplication should be limited within proper bounds. * * * Such competitive conditions may temporarily benefit some shippers but, if continued unchecked, are bound to result in permanent injury." 182 I. C. C. 376.

without success.[2] As Judge Hutcheson stated, "Most of the courts have felt constrained by the Frost decision to deny to the State the right to make existing regulations as to common carriers applicable to private carriers; many of them have avoided the difficulty by finding that the carriers involved were in fact not private, but common carriers, while some of them have sustained the statutes on the ground that they did not attempt to convert private carriers into common carriers, but in effect imposed specific legal regulations upon each class of carrier, to which each must conform" (R. 136).

Emphasis in this law, however, is laid upon the great public interest involved and the state's power and duty to act for the general welfare in the protection of that interest. If the Legislature had approached the problem from the viewpoint of only one truck and one contract, the gravity of the situation would have been missed entirely. It is only by considering the aggregate effect of such carriers by multiplying one truck and one contract by the thousands so operating that its real import can be appreciated.

There is a direct relationship between the maintenance of a dependable transportation system and

---

[2] "All of the states, except Delaware, have laws regulating the operation of motor vehicles as common carriers of passengers. Thirty-nine states have laws regulating operation of such vehicles as common carriers of property, and thirty-four states have enacted laws dealing with the operation of truck contract carriers. This fact is the evidence of the need for regulation." 182 I. C. C. 371.

the problems of highway safety and protection which can be better understood with a brief statement of general traffic conditions of the State.

In many respects the transportation problems of the State are unique. Its immense area requires approximately 200,000 miles of public highways to connect its various communities (R. 240). The great distances between its marketing centers have made it economically impossible to construct a complete system of improved roads (R. 239). Consequently, it has been necessary to limit to the absolute minimum the number of transstate roads of the higher grades capable of accommodating modern commercial uses (R. 239-241).

The State and the several counties have expended hundreds of millions of dollars of the public funds in constructing their highways [3] (R. 253). To bring this system up to the modern type necessary for excessive uses would cost many hundred million dollars more. This cost is too great to be borne by the people (R. 239).

Due to the limited number of cardinal highways of rigid or improved types, traffic congestion has become a most serious problem. Naturally, because of their improved condition traffic in unprecedented volume

[3] "The growing use of trucks necessitates extensive financing of highway construction and maintenance; their operation is attended by danger to persons and property on or in the vicinity of the highways and is hazardous to the public." 182 I. C. C. 375.

has flowed into them rather than taking the roads of inferior character (R. 250-251).

The phenomenal increase in private automobiles during the past fifteen years is a matter of common knowledge and history. It is not too much to say that modern highway construction found its greatest support among persons who desired to make only the ordinary use of them. These highways were designed and constructed principally to accommodate these private uses. Today the highways are crowded with millions of such vehicles carrying their occupants from home to office, from farm to market, and from city to city. Many of them are crowded to the limits of safety and convenience with private vehicular traffic.

It has only been within recent years that motor trucks have created a menace on the highways. They increased 300 per cent in the past six years in Texas, there having been 206,000 registered in 1930 (R. 252.) These vehicles do not include the tremendous increase in interstate trucks, which is a more recent development (R. 254). During the past three years truck traffic has increased in density from 40 per cent to 500 per cent on the various highways of Texas (R. 256).

This extraordinary increase in traffic, both of trucks and automobiles, presented serious problems. First was the fact that heavy trucks were destroying the highways which had cost millions to build. The money used to construct them had been borrowed for long periods of time and the taxpayers faced the prospect of having their roads destroyed many years before they had paid for them (R. 239).

Again, there was an excessive maintenance cost which had resulted from those unusual uses. It cost the State an average of twelve million dollars per year for the past three years for the maintenance of State highways alone. This figure does not include the maintenance cost of the counties for the more than 180,000 miles of county highways (R. 253).

Not only did this traffic destroy the highways and require excessive and burdensome expenditures for maintenance but the unusual dimensions, weight and speed of trucks and the density of traffic generally greatly endangered the lives and property of those who were entitled to use them in the usual and ordinary way.

In the year 1931 the situation became so acute that a change in legislative policy was essential in the public interest. The unprecedented increase in carriage for hire over the highways had all but crowded the average citizen off of them. Either carriage for hire by road must be held within reasonable bounds or it would be only a matter of time until the highways would have to be surrendered for their exclusive use. The act in question, or one similar to it, seems to be the only fair solution of that problem.

The grave problems of highway protection and of safety and convenience in the ordinary and usual use thereof were only partially solved by the act sustained in the Sproles case. While that law reduces the load and dimensions of motor trucks, it accomplishes little or nothing toward relieving the highways of congestion and unnecessary uses, which contribute as much or more to highway damage and hazards and public

inconvenience than any other factor (R. 255). One major purpose of the act, in the instant case, is to remedy those mischiefs (R. 31-32).

It is of vital importance to the State that its Railroad Commission be clothed with power to accomplish those desirable ends. If it is to be denied the power to regulate and limit the volume of the extraordinary commercial uses now made of its highways the only other course open to it is to prohibit such use altogether.

That restriction and regulation of this new form of transportation is absolutely essential to the welfare of the people will be better understood by noting briefly the history of transportation in Texas.

It is a matter of judicial history that Texas was a pioneer in railroad regulation. Since the construction of the first railroad in the State, more than seventy-five years ago, transportation problems have received more attention from its lawmakers than any other branch of law. Thousands of cases resulting in a great body of precedents have been decided by its judicial tribunals. Numerous statutes have been enacted, both to regulate and control, and to relieve and encourage railroads, as well as other forms of carriers.

The State's policy is largely explained by the fact that the distances between its producing areas and its outlets are so great. The great bulk of its products, such as cotton, grain, oil and livestock, are moved hundreds of miles, wholly within the boundaries of the State. Movements hundreds of miles in extent originate and end within its boundaries. Its vast exports are moved to its port cities without crossing State

lines. Thus it is apparent that its greatest problems are chiefly of local concern.

Because of these facts the State has always been especially dependent upon railroads and other means of transportation. In order to insure the development of its natural resources it was deemed sound public policy in the early days to give the railroads millions of acres of the public domain to encourage their extension to all parts of the State. This generous policy resulted in the construction of more than 16,890 miles of railways in Texas and represents an investment of over nine hundred million dollars (R. 263 and 276).

A great army of so-called "private" contract carriers suddenly entered the transportation field. By the year 1931 they had taken so much tonnage from the State's railway systems that many of them were threatened with bankruptcy. Railway service was seriously impaired. Common carrier truck lines suffered tremendously and were fast disappearing from the highways (R. 244-5, 247).

Contract carriers were selecting and taking the cream of the transportation business and leaving the low grade and less profitable hauls for the railways. In great swarms they plied their business on public property without regulation and in total disregard of the public welfare (R. 244).

Looking at any one of them at any given time revealed only a few trucks with a few "private" hauling contracts. That same one, however, since his business was that of hauling for hire, would have many contracts in the course of a year.

Experience had shown that unless the State could restrict the number of them and prescribe their rates, effective control would be impossible (R. 244-5, 247). If it could not enforce regulations of this character, then it was powerless to preserve and protect its great common carrier systems from destruction or serious injury. The great body of citizens who, of necessity, depended upon common carrier service would have to pay higher freight rates and would be deprived of adequate and dependable transportation facilities which their interests demanded (R. 223, 226, 284).

It was clearly evident that contract trucks were giving most serious competition to railway and common carrier truck lines with the effects already noted. It likewise was clear that this competition was unequal and unfair. With thousands of idle box-cars and empty common carrier trucks, there could be no doubt that the contract carrier service was wasteful and unnecessary. This would have been the case even under normal conditions.[4] This excess of transportation facilities explains, in a measure, the cut-throat competition which ensued (R. 281-4). It appeared certain that a solution of the problem was impossible so long as the great horde of contract carriers were per-

[4] "There is today, and probably would be under normal conditions, an excess of carrying capacity of existing transportation facilities; * * * unrestrained competition is an impossible solution of the present transportation problem and is incompatible with the aim of coordination under regulation." 182 I. C. C. 380.

mitted to engage in unrestrained competition with dependable transportation agencies (R. 244-5, 247).

The legislative judgment of these conditions is fully sustained by findings of the Interstate Commerce Commission, based on a general investigation made by it (*Coordination of Motor Transportation*, No. 23,400, 182 I. C. C. 263-430, decided April 6, 1932). It recommended Federal legislation along the lines of this act and concluded that contract motor carriers in particular should be regulated.

As Judge Hutcheson states "of all the problems pressing upon the State, none present more comprehensive, more far-reaching, more troublesome aspects, than do those arising from the effect upon the established common carrier transportation services by rail and road, of the rapidly increasing use of the highways for the carriage of freight by hire by persons assuming the real or pretended status of private contract carriers, and asserting their business to be unregulated" (R. 135).

The State, by this act, he said, "has undertaken neither to convert private carriers into common carriers nor upon the pretext of regulating highways, to impose arbitrary restrictions upon the business of those who use them. That what it has done has been to put into effect the legislative policy above referred to; that the business of carrying for hire on the public roads is a business affected with a public interest, which may be enjoyed only under legislative grant. That it has fixed the conditions of such grant, and that any person desiring to conduct his business over the public highways may, under the statutes, freely elect-

ing the character of business he will engage in, apply for, and by complying with the conditions fixed, obtain a franchise as a common or as a contract carrier, according to his desire" (R. 134-135).

"That this system of regulation," he added, "designed in the interest of the public convenience will operate to bring highway order out of highway chaos, by preventing a further disintegration of the all but practically destroyed common carrier service on the roads. That the exercise of the powers which the act confers will not only protect the roadways and the people on them from the results of reckless and careless operation, but will give to the whole people of the State a safe and dependable system of transportation for the carriage of their freight by highway" (R. 135).

Appellants allege they are private contract carriers for hire. Both at the hearing for a temporary injunction and at the trial on the merits, the three-judge court sustained the validity of the law, and, on final hearing, dismissed the bill for want of equity (R. 180).

United States District Judge T. M. Kennerly dissented from the majority opinion of the court (R. 142).

Summary of Argument.

1. The act does not undertake to convert contract carriers into common carriers. It does not require them to devote their property to any different or greater public use than that to which they have already voluntarily dedicated it. It does not require them to render any greater service than they have contracted to render. There is no taking of their property

devoted to one use and declaring it devoted to another use. It leaves them entirely free to regulate their schedules, designate their territory and routes, select their contracts, and the traffic they choose to haul. It merely fixes reasonable conditions upon purely permissive uses appellants make of public property as a place of business. The act is bottomed on the State's undoubted power to protect its highways and remove traffic hazards as well as its power and duty to foster and preserve a dependable transportation system for the whole people. The regulations of the act, including the power to fix minimum rates, extend only to those phases of contract carrier operations which adversely affect the public welfare and are reasonably related to the accomplishment of its valid purposes. *Sproles v. Binford*, 286 U. S. 374; *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391; *German Alliance Insurance Company v. Lewis*, 233 U. S. 389.

2. Transportation is the most important of the public services. Experience has demonstrated the absolute necessity of its regulation to preserve and protect the public interest. The business of contract carriage has grown to such enormous proportions within recent years that it threatens to destroy common carrier transportation agencies. Its manner of operation has seriously affected the economic and industrial life of the people. Its unrestrained and unregulated use of public highways, together with its discriminatory rates and practices have resulted in irreparable injury to the public welfare. Contract car-

riage has developed such a peculiar and intimate relationship to the public interest that the State's power to enforce the regulations of the act is superimposed upon it. Appellants, and the class of contract carriers who are reached by the act, are, under conditions now obtaining on the highways, engaged in a business which is affected with a public interest, and the reasonable regulation of their rates and practices is essential for the protection of that interest. *Munn v. Illinois, supra; Budd v. New York, supra; Brass v. North Dakota, supra; German Alliance Insurance Company v. Lewis, supra; Wolff Packing Company v. Court of Industrial Relations*, 262 U. S. 522; *Sproles v. Binford, supra; Coordination of Motor Transportation*, 182 I. C. C. 263-430.

3. The act imposes substantially different schemes of regulation upon common and contract carriers and there is a clear differentiation between the two classes. The burdens imposed upon contract carriers are less onerous than those applied to common carriers. It authorizes no greater regulation of appellants' business than is essential to protect the great public interest involved. *Smith v. Cahoon*, 283 U. S. 553.

4. Section 6(*d*) authorizing the issuance of special permits for the transportation of certain named commodities is not open to the construction that persons operating thereunder are not subject to regulation upon the same basis as appellants. A proper construction of the act subjects special permit operators to every regulation applicable to appellants. This con-

struction avoids their contention that the act is discriminatory. *Smith v. Cahoon*, 283 U. S. 553.

The act is clearly severable and if Section 6(*d*) is invalid it, and not the act, must fall. *Williams v. Standard Oil Company of Louisiana*, 278 U. S. 241.

5. The act does not apply to persons transporting their own property in their own trucks. Its classifications are based upon the substantial differences of fact between persons making a constant and extensive use of highways in the business of hauling for hire and persons making only a limited and incidental use in the ordinary and usual pursuits of life. The distinctions are drawn upon differences in the manner and extent of those uses and there is a rational basis for them. *Sproles v. Binford, supra.*

ARGUMENT.

I.

The act does not require appellants and others of their class to devote their property to any different or greater use than that to which they have devoted it themselves. It merely fixes reasonable conditions upon purely permissive uses made of public property as a place of business in the public interest and welfare. (In Answer to Appellants' Point I, R. 289.)

In considering appellants' contention that the act compels them to dedicate their property to the quasi public use before they can operate as contract carriers, it is important to fix with definiteness the limitations which have been thrown around the exercise of

the power conferred upon the State Commission and to determine just what persons are subject to its provisions.

In the first place, it is made entirely clear by Section 6(*a*) that the Commission's supervision extends only to those who make a business of hauling for hire over the public highways (R. 17). It is only the contract carrier who uses public property as a place for making a living who is subject to its terms.

The act was so construed by the trial court (R. 140-141):

> "In the same way we notice the argument of the intervener Beard that the Act is unreasonably restrictive because its effect is to prohibit the casual use of roads by individuals who, not in the general business of carriage for hire, but as mere agents for another, casually haul making a charge therefor.
>
> "In our opinion the Act does not admit of such interpretation. We think it is directed at and reaches only those persons who, as complainants and interveners, do make their living off of carriage on the roads. Besides, none of those in this case are casual carriers; they are all in it as a business. In fact there is more than a little question as to whether though the particular work they are now doing may be under private contract, they are not really common carriers since they in fact hold themselves out for all the work which they may get to do. Certainly none of them is a casual carrier or in a position to complain on behalf of such carrier of hardships which the law may have imposed upon him."

That this view of its meaning answers the argument that it is unreasonably restrictive needs little demonstration. The merely casual or incidental haul for hire which persons in their ordinary demands might make on the highways is unaffected by the act. This would be true, for example, in case a farmer desired to pay his neighbor on the adjoining farm for hauling a load of cotton or wheat to market, or if a man in the city wished to compensate his neighbor for moving his furniture. Under this act the casual, incidental and isolated hauls for hire will continue to enjoy the ordinary use of the public highways.

Even when one is engaged in the business of hauling for hire, he is not subject to regulation unless his operations are of sufficient magnitude to extend between two or more incorporated cities, towns or villages; nor do its provisions apply to vehicles operated exclusively within the corporate limits of cities and towns (Sec. 1(*g*), R. 13). Thus the act imposes no burdens upon that class of carriers operating on short hauls between points of origin and common carrier stations, or on those who are making only ordinary and limited uses of the highways. *Sproles v. Binford,* 286 U. S. 374.

In brief, one operating as a contract carrier is not subject to regulation under the terms of the act unless: (*a*) He is engaged in the business of hauling for hire over the highways, and (*b*) his operations extend between two or more incorporated cities, towns or villages. In the absence of either of these conditions he is free to operate without hindrance of this law.

Finally, the Commission is not authorized to regulate the rates and service of contract carriers who do not operate in competition with common carriers (Sec. 6*aa*, R. 19).

It is plainly apparent from all this that the Legislature was aiming not at the limited and ordinary use of the highways which the average citizen might be expected to make as an incident of his own business needs, but it was aiming at the extraordinary and extensive commercial uses which had developed along with improved roads. The classification is based upon the substantial differences between these uses.

Appellants are subject to the regulations of the act because they are engaged in the business of hauling for hire between two or more incorporated cities (Findings I to VII, R. 171-3). All other carriers making a similar use of the highways are subject to its terms. If they choose to do so they may limit their operations in such manner as to avoid regulation. They are not subject to the act because of the kind or number of vehicles they use, nor because of the particular commodities they haul, nor yet because of the amount of tonnage they carry, but simply and solely because they are making a regular and extensive use of the public highways as a place of business.

Having determined who are members of the legislative classification designated "contract carriers", and the conditions under which the Commission's regulatory powers may be exercised, we shall now answer the argument that the act requires them to dedicate their property to the quasi public use before so operating over the highways.

It should be borne in mind at all times that appellants and others similarly situated are carrying on a business for gain upon public property which is constructed and maintained at public expense. To this important extent, at least, their status as carriers is distinguishable from all others. In the case of railways, pipelines, and other public carriers the right-of-way is acquired and maintained at the carrier's own expense, and under the authority of a delegation by the State of its power of eminent domain. Motor carriers, however, are devoting to their own use and profit that which belongs to the public and without assuming the burdens of acquisition and maintenance, and under circumstances where the previous exercise of the power of eminent domain by the State inures as much to their benefit as it would have had they exercised it for themselves..

Perhaps these facts form the principal basis for the almost universal rule that the use of public highways by carriers of property for hire is an extraordinary use which is enjoyed as a mere privilege or license and which is revocable at the will of the Legislature.

This doctrine was approved by the Supreme Court of Texas in the recent case of *Ex parte W. W. Sterling et al.*, No. 6322, decided October 1, 1932, not yet officially reported. The opinion adopted by the court used this language:

> "The law making body of this state may, if it considers it in the public interest, withhold altogether the use of public highways from the operation of trucks carrying freight for hire. The power to prohibit the use of the highways for

> such purposes necessarily includes the lesser power to place such restrictions and regulations upon the use thereof as may be deemed proper, even though the burdens imposed may be of such a nature as to prevent any profitable operation upon the part of those desiring to pursue such business. Of course, where the legislature grants the right to the use of the highways for the carrying of freight it cannot unreasonably and unfairly discriminate in favor of or against any particular person or class of persons. *Smith v. Cahoon*, 283 U. S. 553; *Sproles v. Binford*, 286 U. S. 374. In our opinion the act in question is, as was held by the Supreme Court of the United States in the Sproles case, free from any such discriminatory provisions."

This pronouncement by the highest court of Texas is in complete harmony with the rules which have been approved by this Court. *Buck v. Kuykendall*, 267 U. S. 314; *Packard v. Banton*, 264 U. S. 140; *Michigan v. Duke*, 266 U. S. 571; *Frost v. Commission*, 271 U. S. 583.

Since appellants and others of their class in making this extraordinary use of the highways do so at the sufferance of the State and not as a matter of right, we pass to a consideration of the conditions which have been affixed to that use.

In the first place contract carriers are not declared to be common carriers, nor are they required to become so in fact. Both are left by the definitions contained in the act exactly where they are by the decisions of the courts. This is made clear by the definition contained in Section 1(*h*) (R. 13). A contract carrier is defined

as a motor carrier operating "other than as a common carrier." Stated in another way, the common carrier provisions of the act can only be imposed upon common carriers as that term is defined by the decisions. The same is true of contract carriers.

The act then imposes distinctly different schemes of regulation upon common and contract carriers. It neither undertakes by legislative fiat to convert contract carriers into common carriers as was done in *Michigan v. Duke*, 266 U. S. 571; nor does it unlawfully condition the use which contract carriers may enjoy which was the vice pointed out in *Frost v. Commission*, 271 U. S. 583. It does not undertake to exclude altogether as was the case in *Buck v. Kuykendall*, 267 U. S. 314; and there are no discriminations as between commodities hauled or lack of differentiation between the two classes as was the case in *Smith v. Cahoon*, 283 U. S. 553.

In support of this classification the court below made the following findings:

> "We find that the Legislature has not undertaken to convert private carriers into common carriers, nor upon the pretext of regulating highways to impose arbitrary restrictions upon the business of those who use them. What it has done has been to put into effect the Legislative policy, which it has declared should be adopted, that the business of carrying for hire on the public roads is a business affected with the public interest which may be enjoyed only under Legislative grant" (R. 178, Finding XXX).

> "That it has fixed the condition of such grant in clear and plain language and that any person desiring to operate a business on the roads may obtain a franchise according to his desires" (R. 178, Finding XXXI).

It's conclusions of law further support this view of the act:

> "That the Legislature has not undertaken to convert private carriers into common carriers by any kind of fiat, and it has not imposed arbitrary restrictions upon the business of persons using the highways" (R. 179, Conclusion III).
>
> "That it merely has done what it has a right to do, asserted its will as to the conditions under which persons who use the public roads in the conduct of their business may obtain a franchise to use them, and that the exercise of such powers has not, in any manner, transgressed the Fourteenth Amendment" (R. 179, Conclusion IV).

A detailed consideration of the act will demonstrate that contract carriers are left entirely free to regulate their schedules, designate their territory and their routes, select their contracts, and the commodities they choose to haul. They are under no burden or duty of accepting any commodity which they have not contracted to haul. They are not required to accept or transport the freight of any shipper. In other words, by complying with the reasonable and non-discriminatory conditions fixed by the act they may freely elect the character of business in which they wish to engage and obtain permits or franchises to use the public highways for that purpose.

There is nothing in the act which requires a contract operator to put his property to a new or different use than that to which he has voluntarily devoted it. There is no requirement that he perform a greater service than he has contracted to render. Here there is no taking of property devoted to one use and declaring it devoted to another and a different use; no creation and regulation of a new use. *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391; *Cotting v. Kansas*, 183 U. S. 79; *German Alliance Insurance Company v. Lewis*, 233 U. S. 389.

The chief, if indeed it is not the whole complaint which is made against the act is that it authorizes the Commission to refuse a permit if it be of the opinion that the proposed operation will impair the efficient public service of any authorized common carrier then adequately serving the same territory (Sec. 6(*c*), R. 18); and when they are operating in competition with common carriers, that the act authorizes the Commission to fix minimum rates not less than those prescribed for common carriers for substantially the same service, and authorizes it to prescribe rules and regulations for their government (Sec. 6*aa*, R. 19).

Appellants erroneously state at pages 2 and 3 and under Points II and III of their brief that the act authorizes the Commission to fix both maximum and minimum rates for contract carriers. This error results from their failure to give proper consideration to the specific provisions which control the general provisions of the Act. Section 4(*a*) (R. 14) vests the Commission with general power to prescribe maximum

or minimum or maximum and minimum rates for motor carriers. Motor carriers are defined by Section 1(*g*) (R. 13) to include both common and contract carriers. However this general power to fix rates is limited by the language of Section 4(*a*) with the statement that it shall be exercised "in accordance with the specific provisions" contained in the act. The specific provision relating to the Commission's power to fix contract carrier rates is contained in Section 6*aa* (R. 19). It authorizes the Commission to fix minimum rates only. That the Commission is authorized to fix minimum rates only for contract carriers is made certain when the penalty provisions of the Act are considered. It is made a misdemeanor by Section 16 (*i*) (R. 29) for a contract carrier to charge a lesser rate than that fixed by the Commission, but not for charging a greater rate. These provisions clearly show that the Commission's power is limited to that of fixing minimum rates only for contract carriers.

The Texas Commission has so construed the Act (R. 204). Appellants have so construed the Act by the allegations contained in their bills of complaint (R. 37).

We again call the Court's attention to the fact that the Commission's power to fix minimum rates may not be exercised unless contract carriers are operating in competition with common carriers (Sec. 6*aa*, R. 19).

Clearly these provisions do not require appellants to devote their property to any new or different use, but merely regulate the use already made of the highways. The Commission's authority to refuse a permit under the conditions named is based, in part, upon the

State's undoubted power to protect its highways and to relieve them of hazards and congestion, and in part upon its power, as well as its duty, to foster and preserve a safe and dependable transportation system for the whole people. Its power to prescribe minimum rates is not only essential for the latter reason but, additionally, to prevent the destructive competition, discrimination and irresponsible practices which have so greatly injured common carrier service in the State, as well as individuals, communities, and the business structure generally. That these uses of the highways have had these effects will be fully shown under our Point II.

The other regulations requiring the keeping of accounts and making of reports, as well as the penalties prescribed for rebates and discriminations are essential to the effective enforcement of the act. Without these provisions the great purposes of the act would be entirely defeated.

Section 13 of the Act (R. 24-25) which requires motor carriers, common and contract, to carry insurance for the protection of the public has been construed by the Texas Commission to require contract carriers to carry cargo insurance for the protection of the shippers for whom they transport property. This section has not been construed by any of the state Courts. It is open to the construction that its requirements for cargo insurance do not apply to contract carriers. If it be construed as requiring cargo insurance for contract carriers it should be remembered that in this case, as distinguished from the

Frost and Cahoon cases, we have shown that contract carriers are engaged in a business which is affected with a public interest. If contract carriers are engaged in a business which is affected with a public interest the requirement for cargo insurance becomes a reasonable and valid regulation for the protection of the general public.

In connection with this requirement it should be remembered that many, if not most hauling contracts are oral and are entered into with the mere formality of tendering the freight and agreeing upon a rate (R. 198). We have shown that contract carriers taken collectively and as a class are in the business of hauling for hire the property of the general shipping public. In passing on the validity of this act, and this particular requirement, it would be a narrow view to take that the inquiry must be restricted to the particular arrangements between carrier and shipper at a given time. The real problem cannot be appreciated unless a course of dealing covering a reasonable period of time is considered.

That the trial court approached the problem from that viewpoint is shown by the following findings:

> "The complainant, J. H. Stephenson and the complainant-interveners, W. S. Finnegan, P. E. Arnett, D. A. Beard, V. C. Bilbo, B. E. Ites, J. T. Carroll and A. S. Robinson, are each engaged in the business of transporting property for hire by motor trucks over the highways of the State of Texas as contract carriers, but, though the particular work they are now doing is under private contract with one customer, motor car-

ries of this character, as a business, usually and at their own option, transport selected commodities for different customers between numerous points from time to time; that, though any one operator is a private carrier, the combined results of the numerous contract carrier operations, including complainant and complainant-interveners and others similarly situated, adding together the carriers and their contracts, constitute a transportation which, in its sum total, includes every character of carriage which is performed by common carriers." (R. 172-173, Finding VII).

"The number of contract carriers on the highways of Texas having rapidly grown, as elsewhere found, the business they conduct now exists as a very large factor in commercial transportation. The court finds that it is not the effect of one such carrier or a limited number thereof which produced the serious problem with which the Legislature of Texas purported to deal and has dealt, but it is the effect, in the aggregate, of such contract carriers that is important." (R. 176, Finding XXII.)

When viewed in this light the requirement for cargo insurance does not appear to be unreasonable. On the contrary the shipping public, under modern conditions, is so much dependent upon contract carriage, which, in its sum total, as stated, includes every character of carriage, that such protection is now essential to preserve its interests.

We believe, therefore, the act is not subject to the objection that it requires appellants and others of their class to devote their property to any different or

greater public use than that to which they have devoted it themselves; that the conditions imposed upon contract carrier operations are reasonable and necessary in the public interest and appellants first proposition is therefore without merit.

II.

The class of contract carriers who are reached by the act are, under the conditions now obtaining on the highways, engaged in a business which is affected with a public interest, and the reasonable regulation of their rates and practices is essential for the protection of that interest. (In Answer to Appellants' Point II, R. 289-290.)

Consideration of this proposition necessarily begins with the leading case of *Munn v. Illinois*, 94 U. S. 113. That case "introduced into American constitutional jurisprudence the doctrine that an industry or occupation, not in itself public in nature, may become such in fact and substantially in law by reason of the position of importance and indispensableness it comes to occupy in the economic and industrial life of the people; in other words, that it thereby becomes 'affected with a public interest' and subject to the same power and modes of State regulation as are allowable in cases of industries essentially public in nature." *Willoughby on Constitution of United States*, Vol. 3, Sec. 1157, page 1749.

We merely wish to emphasize the fact that the Munn case dealt with a business which had grown to such importance and the manner of its operation was such

that it affected the economic and industrial life of the people and that it was thereby affected with a public interest for those reasons. The act here under consideration deals with a business which, within the past five or six years, has grown to such proportions and is conducted in such manner that it seriously affects the economic and industrial life of the State.

Since the Munn doctrine was pronounced, it has been modified and extended by many subsequent decisions of this Court. Many industries and businesses over the years, some new and some old ones, have by developing a new or peculiar relationship to the public brought themselves within the field of regulation.

The erroneous notion that this regulatory power is limited to cases where the owners of property enjoy a virtual monopoly in their business was corrected in *People v. Budd*, 117 N. Y. 1, affirmed in *Budd v. New York*, 143 U. S. 517. That case extended the regulatory power of the State to businesses which hold such a peculiar relationship to the public interest that such power is superimposed upon them.

In *Brass v. North Dakota*, 153 U. S. 391, this Court sustained a statute regulating rates for grain elevators. Mr. Justice Brewer pointed out in a dissenting opinion that along a single railway line within that state there were six hundred elevators operated by over 125 persons and varying in cost from $500 to $5,000 and that any person could, at a cost of less than $200, provide himself with storage facilities. In this connection he stated:

> "Property used in handling and storing the great staple articles of food and the necessaries

> of life, by which use a tax or toll is levied thereon, ceases while applied to such use to be *juris privati* only and becomes affected with a public interest, and such use may be regulated by the legislature without encroaching upon any of the constitutional rights of the owner."

While those cases show that the element of monopoly or special governmental privilege is not essential, it is not entirely lacking in the operation of this law. It limits the number of permits or franchises which may be issued and prohibits others from so operating over the highways. Thus the governmental privilege which is granted is of much greater value to the holder and in some measure approximates the nature of a monopoly.

Attention is also directed to the close analogy existing between the situation of motor carriers for hire making only a permissive use of public property, and that of other carriers and businesses acquiring rights of way and places of business abode by virtue of the delegated power of eminent domain. The courts have generally adhered to the notion that the delegation of this prerogative of sovereignty, accompanied by the exercise of privileges under it, gives rise to certain obligations of a public nature and within itself opens the door to public regulation of such businesses. It is difficult to perceive any substantial difference in their situations. One acquires his own right of way and pays for it. Motor carriers do neither but operate under franchise over public thoroughfares. If there is a difference, it appears the motor carrier has the better bargain; that he has been granted greater privi-

leges and, therefore, is under greater obligations to the public. If this be true, it does on that basis invest his business with a public interest and entitle the public to the regulate it in its interest.

Carrying that reasoning further, has not the contract carrier, in exercising the privilege of such a use of public highways, voluntarily dedicated his property to a public use? We think so, and that he should not be heard to complain of a reasonable regulation of it.

Of course the question whether a business has been rendered subject to regulation because affected with a public interest is ultimately a judicial one, depending upon its nature and the circumstances under which it is conducted. The right to regulate private property has usually been sustained on the theory that the public has acquired an interest in it because of the nature and character of the business, and further, because the owner has devoted it to a public use which is consistent with that public interest. This much was determined by the Munn case.

When the owner devotes his property to a use in which the public has an interest, he thereby grants the public an interest in that use and must submit to regulation for the common good, at least to the extent of the interest he has created. *Charlestown Natural Gas Company v. Lowe,* (W. Va.) 44 S. E. 413; *People v. Budd* (N. Y.) 22 N. E. 676, affirmed in *Budd v. New York,* 143 U. S. 547.

The Court's comment in *German Alliance Insurance Company v. Lewis,* 233 U. S. 289, is peculiarly applicable to the instant case. The act there under consideration dealt with the regulation of a business based

upon contracts of insurance which had theretofore been considered private in nature. The court pointed out that fire insurance had, for some time, been regarded by the states as a business requiring more or less special police and other regulation. The court very pointedly remarked that "a conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse." It went on to say that a large part of the country's wealth is protected by insurance and that this fact demonstrated the public interest in it.

Of special significance in that case were the court's statements that "contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the inidvidual," and the further statement that:

> "We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary business of the commercial world, to pursue which a greater liberty may be asserted. * * * The contracts of insurance may be said to be interdependent. They cannot be regarded singly or isolatedly."

The striking parallel between that situation and the one here is too obvious for comment. May we simply remind the Court that the demand for effective control of contract carriers is almost universal, as witness its own decisions and those of the numerous inferior courts of the land. May we say also that the per-

sistence of this demand saves it from the charge of unconsidered impulse, and stamps it with the verity of vital public need.

In like manner may we add that the millions of hauling contracts executed on public highways are interdependent from the public viewpoint and cannot be regarded singly or isolatedly.

In the recent case of *Wolff Packing Company v. Court of Industrial Relations*, 262 U. S. 522, the State undertook to fix wages in establishments for the manufacture of food and clothing or for the production of fuel or its transportation. While the court held the act unconstitutional, it threw additional light upon this subject in its analysis of the industries which are affected with a public interest. Among others this Court recognized as an important class, subject to regulation, those industries which, though not public at their inception, may be fairly said to have risen to be such. Concerning this class the Court said:

> "They have come to hold such a peculiar relationship to the public that it is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly."

That case discussed another class which includes those industries carried on under the authority of a public grant of privileges which, accompanied by the exercise of those privileges, gives rise to certain obli-

gations of a public nature and opens the door to public regulation. This case, it will be observed, combines the elements contained in both the first and third classifications which were noted in the *Wolff Packing Company* case.

We have already shown that the act does not apply to the casual or incidental contract haulers but only to that class of contractors who, by reason of their regular and continuous use of the public highways as a place of business, have created the perplexing problems which the act seeks to solve. Specific attention will now be given to these problems and to the effects these uses have had on the various interests of the State in the light of the authorities we have discussed.

(*a*) *The Extent and Nature of the Business of Appellants.*

Appellants represent the court below as finding that each of appellants is "operating one, or some few, trucks under one contract with one owner of goods." Appellants further state that their status "as small private contract carriers is in no way assailed" and that their character as such is sustained by the record in this case.

An examination of the court's finding VII (R. 172) reveals that contrary to appellants' statement the court did not find that each of appellants was "operating one, or some few, trucks under one contract with one owner of goods." But in fact the court found that "the particular work they are now doing is under private contract with one customer." The court made no finding whatever with reference to the number of

trucks appellants were operating; to the number of owners of goods transported by them, and made no finding with reference to the manner or extensiveness of the transportation services performed by appellants. On the contrary, in the very finding to which appellants refer, the court found that: "Motor carriers of this character, as a business, usually and at their own option, transport selected commodities for different customers between numerous points from time to time; that, though any one operator is a private carrier, the combined results of the numerous contract carrier operations, including complainant and complainant-interveners and others similarly situated, adding together the carriers and their contracts, constitute a transportation which, in its sum total, includes every character of carriage which is performed by common carriers."

Appellants' statement that their status "as small private contract carriers is in no way assailed" is not supported by any finding of the court or by any fact contained in the record of this cause. On the contrary the record shows that appellants make an extensive use of the public highways as a place to conduct their business.

We submit the following concise statement of the nature and extent of the operations of appellants:

Complainant J. H. Stephenson:

(1) Operates three trucks valued at $15,000 (R. 209).

(2) Contract with Southwest Freight Company, Inc. Also referred to as Southwestern Freight Company, Inc. (R. 210).

(3) Hauls between Houston and San Antonio, Texas. Approximately 200 miles (R. 208).

(4) Southwest or Southwestern Freight Company, Inc., is a forwarding company collecting into shipping lots the freight shipments of the general public (R. 171).

(5) Transported many carloads of freight over the highways between Houston and San Antonio, Texas (R. 209).

(6) Will earn net profit under his contract of $10,000 per annum (R. 210).

Intervener W. S. Finnegan:

(1) Motor truck equipment valued at $4,000 (R. 217).

(2) Contract with West Texas Motor Freight Lines, a common carrier by motor truck hauling traffic for the general public (R. 215).

(3) Hauls between Houston, Texas, on the one hand and Dallas, San Benito, Brownsville and McAllen, Texas, on the other hand (R. 171). The territory covered traverses approximately 500 miles of highways.

(4) Will earn, from the transportation of property over the highways of Texas, a net profit of $3,500 under the terms of his contract (R. 217).

Intervener P. E. Arnett:

(1) Motor truck equipment valued at $6,000 (R. 217).

(2) Contract with Linde Air Products of Texas, a manufacturer of gas products shipped in cylinders (R. 216).

(3) Hauls between Houston, Texas, and all points in the State, principally between Houston

and Beaumont and Port Arthur (R. 216). The territory covered traverses the entire highway system of the State.

(5) Will earn net profit, from the transportation of property over the highways of the State, of $6,000 per annum under the terms of contract (R. 217).

Intervener D. A. Beard:

(1) Motor truck equipment valued at $18,000 (R. 199).

(2) Contract with Peden Company, a jobber and distributor of hardware and iron and steel articles (R. 198).

(3) Hauls between Houston, Texas, and all points generally throughout the State (R. 198). Territory covered traverses the entire highway system of the State.

(4) Handled about ⅓ of all commodities shipped by Peden Company and earned gross revenue of $15,000 in period of approximately four and a half months (R. 198).

(5) This intervener appeared before this Court in the case of *Binford v. McLeaish*, No. 391, October Term, 1931. That case involved only motor carriers transporting cotton over the highways. Beard there swore that:

"During the past cotton season I transported, for various persons, approximately 75,000 bales of cotton to Houston and Galveston, 46,000 bales for one firm to Galveston, the balance for various firms to Houston. I made a private contract for each load or shipment, the charge of transportation differing with the locality, condition of the roads, weather, and the bar-

> gaining power or shrewdness of the individual owner." (Page 180 of Binford *v.* McLeaish record.)

Again in that case, at page 181, the same D. A. Beard swore that:

> "I have hauled lumber, dry goods, roofing material and other articles."

The period of time involved in the sworn statements of Beard in cause number 391, October Term, 1931, relates to substantially the same period of time covered by his sworn statements in the instant case.

Intervener V. C. Bilbo:

> (1) Operates 18 motor trucks (R. 213).
>
> (2) Has contract with the Great Atlantic and Pacific Tea Company (R. 212).
>
> (3) Hauls from Dallas warehouse of Tea Company to their branch stores and covers territory within 230 miles radius of Dallas (R. 213). This covers a substantial portion of Texas and parts of Oklahoma, Arkansas and Louisiana.
>
> (4) Transportation includes merchandise, supplies and commodities of every kind and character. Volume not shown of record (R. 213).

Intervener J. T. Carroll:

> (1) Operates 23 motor trucks (R. 213).
>
> (2), (3) and (4) Substantially the same as intervener Bilbo (R. 213).

Intervener A. S. Robinson:

(1) Operates 2 motor trucks (R. 213).

(2), (3) and (4) Substantially the same as intervener Bilbo (R. 213).

Intervener B. E. Ites:

(1) Operates 2 motor trucks (R. 220), valued at $3,000 (R. 220).

(2) Contract with Herrin Transfer & Warehouse Company of Houston, Texas (R. 220). Herrin is forwarding company operating similar business to that of Southwest Freight Company.

(3) Hauls between Houston, Texas, and all points in the State (R. 146). Operations traverse all important highways of the State.

(4) Gross income from transportation over highways approximately $400 per month as a result of contract (R. 221).

(*b*) *Their Public Profession and the Extent of Their Operations.*

The undisputed facts of record show that appellants and contract carriers generally perform every character of carriage usually performed by common carriers (Finding VII, R. 172-173).

The making of numerous contracts from time to time is characteristic of the class. Appellees' witness, Robert Mayer, cotton exporter, on this point testified (R. 227):

"These so-called contract carriers do make contracts between themselves and one shipper, but also said motor truck carriers will make the

> same character of contract with any and all shippers having cotton or other commodities for transportation to the ports. While it is true that any one individual contract may be a contract between the motor carrier and one shipper or owner of the cotton, it is also true that as soon as the performance of that particular contract is completed, a motor truck carrier will, and invariably does, offer to handle cotton for other shippers under the same arrangement."

The witness, C. E. Hinds, traffic manager for Butler Brothers, a wholesale merchandising concern of national scope, testified:

> "Contract motor truck carriers generally hold themselves out to make a contract with anybody offering any quantity of freight. * * * These so-called motor truck contract carriers are in fact engaging in a general transportation business. * * *" (R. 271).

Appellants and each of them transport various commodities from their home terminals to practically every important city in Texas. Their routes extend in each instance for hundreds of miles and they use practically every improved highway in the State in performing their contracts (Findings I to VII, R. 171-173).

These facts, which are not contradicted, show the real character of appellants' businesses and demonstrate that they are "public carriers", in fact. They also show that if the Commission is required to judge their character at any given time and on the contracts

then held, it will be impossible to solve the great problem their operations have presented. They show, too, that none of the appellants are casual or ordinary haulers but engage in extensive state-wide transportation services.

(*c*) *Kinds of Traffic Hauled.*

The court found it to be the universal practice of contract carriers to select particular shipments, and desirable traffic, and that this served to produce discriminations between commodities, shippers and communities (Finding IX, R. 173).

The witness C. V. Terrell, Chairman of the Railroad Commission of Texas, testified (R. 244) that contract carriers were taking "the cream of business." He stated it was a common practice for them to "solicit and take that business which it is convenient for them to handle" and that they "underbid the common carriers for such business, thus thwarting the purpose of the regulatory laws".

Appellees' witness, A. J. Stone, testified (R. 223) that freight charges for railroads

> " * * * are so designed as to give to the public a general scheme of rates which would permit all kinds of commodities to move in commerce, such as low grade commodities like sand, gravel and coal and high grade commodities like dry goods and automobile tires. The value of the commodity and its ability to stand transportation charges, plays an important factor in the amount of the freight rates exacted for the transportation service. It is my judgment that

through no other method can the low grade commodities, such as sand and gravel, coal, grain and farm products in general et cetera, be permitted to move in commerce at rates which that character of traffic could reasonably bear and be absorbed by the consuming public.

"Unquestionably, if the transportation by the railroads of high grade commodities and the revenues they receive for such service are to be demoralized by improperly regulated and cutthroat competition, and thereby are deprived of the high grade traffic which, taken together with all other traffic, affords the rail carriers an adequate revenue, but are forced to continue to transport low grade commodities, one result is inevitable, namely, that the railroads will be forced to raise the rates on the transportation of all low grade commodities.[5]

---

[5] "Since in general the railroads cannot reduce their expenses and overhead costs in proportion to declines in volume of business done, either the traffic remaining after diversions have occurred will have to pay increased rates or the railroads will fail to earn a fair return. Where railroad property has been rendered obsolescent, it becomes necessary to determine how far the public shares the responsibility and what part, if any, of the cost of carrying such property in the future should be borne by rate payers. Where, however, there is simply a reduction in volume of business, there are increased unit costs which the railroads must shift to the public if the return on such property is to be kept at a level recognized to be essential. Those who must use the railroads—and these would be essentially long distance shippers and shippers of low-grade commodities—face an increase of their rate burdens. Shippers

"This result, in my opinion, is inevitable, and will unquestionably deprive the low grade commodities of an opportunity to move to consuming markets". (R. 224).

The witness then showed that the average per ton revenue for railroads for all traffic was $2.02, while the average for trucks was $8.56 per ton (R. 224).

He further showed that 65 per cent of railway revenue is derived from high grade traffic and only 35 per cent comes from the low grade heavy traffic (R. 224).

---

will endeavor to escape the effects of increased rates, thus giving added incentive to territorial decentralization of production. Such decentralization in turn adds to the railroads' competitive difficulties and may set forces in motion which they will find increasingly difficult". 182 I. C. C. 365.

The traffic paying the greater revenue has been lost to the trucks. Railroads furnish a year-around and dependable service and are prepared to handle peak loads of traffic and go to great expense to have cars ready to take care of this traffic. "While the diversion of any traffic may mean severe loss, especially where the traffic yields more than average returns, diversion becomes especially serious where trucks take a large part of the traffic, leaving the railroads to prepare for the peak business as well as to care for the lower volume of year-around business. This condition is most true of agricultural commodities, especially perishable, whose movement is characterized by a high seasonal peak. * * * In these instances the trucks are mainly of the contract or wildcat type and are able to shift about as opportunities offer. The effects of this kind of competition must be dealt with as one of the costs of having two forms of transportation where one would be adequate". 182 I. C. C. 364-5.

He further testified that the Class I railroads in the State carried 89,920,743 tons of freight in 1928, and that only 20.34 per cent of this traffic yielded a revenue of $5 per ton or greater, and stated (R. 224-225):

> "* * * the State of Texas is going to find itself face to face with the problem of the railroads left with eighty per cent of their traffic and thirty-seven per cent of their revenue. In other words, the freight revenue per ton of the railroads and the freight revenue per ton of the motor trucks indicate that the motor truck competition is capable of taking from the railroad common carriers sixty-three per cent of their revenue, but that the motor trucks are only capable of handling twenty per cent of the tonnage, thus leaving for the railroads eighty per cent of the tonnage, with only thirty-seven per cent of the revenue. In my judgment, it is obviously impossible for the railroads to perform eighty per cent of their transportation service upon the basis of thirty-seven per cent of their present revenue. Either one or two things must happen. The freight rates on low grade commodities must be increased, or the railroads will be forced into bankruptcy. In my judgment, many of the low grade commodities cannot be moved into the consuming market upon increased charges. And, furthermore, if the charges were increased to any great extent, there would be a further shift of the traffic to the highways. It is my opinion that the State must, in order to maintain adequate transportation facilities for the public, regulate the rates and charges of the so-called contract carriers,

> by motor trucks. By no other method can the State provide an adequate transportation system for the commerce of the State of Texas".[6]

These facts clearly show the public interest which is involved in the operations of all motor carriers, contract or common, and indicate the necessity for regulation.

(*d*) *Effect on Railways.*

With respect to competition between contract carriers and railways, the court found as follows:

> "We find that there are 16,890 miles of railway lines in Texas representing a property investment of over nine hundred million dollars. That while this system of railways has been developed in order to meet the transportation needs of the State, a large part of such facilities lie idle and unused due, in some measure at least, to the competition of motor truck transportation; that in nearly all instances railway lines are paralleled by one or more competing common carrier truck lines operating over public highways; that many other points in Texas not reached by railways are served by common carrier motor truck lines." (Finding VIII, R. 173).

---

[6] "No plan of rate regulation which does not include within its provisions the contract carrier is thought feasible. * * * Participation of railroad and water lines on an equal basis with independent operators in the transportation of freight by motor truck is desirable". 182 I. C. C. 377.

It further found that contract operations had disrupted railway transportation; that this act and the regulation of rates and service will serve to stabilize railway transportation; that trucks cannot adequately serve the State's transportation needs and that, therefore, the regulations of the act are necessary in order to conserve and maintain an adequate transportation system capable of serving the entire needs of the people; that all available carriage service including that by rail and road are so inter-dependent "that the public may not continue to have a safe and dependable transportation system unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulations bringing their service into relation with common carriers". (Findings VIII, IX, X, XI, XII, and XXV, R. 173-174).

The testimony of record fully supports these findings. Governor Moody, in a message to the Legislature which enacted this law, stated (R. 242):

> "If busses and trucks are operated over routes parallel to existing lines of railway, and in competition with them, it seems evident that under the policy of the Federal Government, as declared in Transportation Act of 1920, that the people will ultimately be called upon to pay higher rates on commodities which must move by rail, and that the same may exceed the public saving accomplished by cheaper bus and truck rates. Motor vehicles are here to stay as a means of commercial transportation, and should stay, but thought should be given to placing motor vehicle transportation in the field which

> will be of the greatest economic value to the whole people. If trucks and busses are to operate in competition with railroads, and at considerable damage to highway development; and if, because of the reduced business of the railroads the public is made to pay higher railroad rates on commodities moving by rail, it is hardly possible that under such conditions the truck and bus transportation could be economically profitable to the general public".

F. I. Cairns, Special Statistician for the Texas and New Orleans Railroad Company made an exhaustive analysis of the effect of motor transportation upon railways in Texas. His testimony is reported at pages 272 to 284 of the record. The exhibits upon which his conclusions are based were too voluminous to print in the record and are brought to this Court as an original exhibit.

He testified that railway lines honeycomb the State and that there is scarcely a conceivable movement of traffic which cannot be handled by rail. He said:

> "That during the past few years heavy quantities of tonnage have been diverted from them to other transportation agencies. That, as a consequence, a large part of their facilities lie idle and unused and that, despite the strongest transportation economies and a tremendous increase in efficiency of operation their ability to continue to render adequate and dependable service is greatly threatened. They are capable at this time of rendering more efficient public service than at any time in the past." (R. 273-274).

The witness called attention to the keen competition existing between trucks and railways and showed that truck operations were conducted in the same territory with and parallel to railway lines and with the result of a wasteful and unnecessarily duplicated service.[7] (R. 274-275).

The study made covers the period from 1921 to 1931 and includes, as stated by the witness, the depression year of 1921. That year, and the years following, therefore, may fairly be compared with the figures for 1930 and 1931 (R. 276).

Freight revenue per mile of road was $11,156 in 1921. This figure rose to $12,725 in 1927. It dropped in 1930 and was only $7,081 in 1931, or only 63 per cent of the 1921 figure and only 55 per cent of the 1927 figure (R. 276).

In 1921 railways earned $2.97 per ton per mile. In 1931 this figure dropped to $2.37 per ton mile, or only 77 per cent of the 1921 figure (R. 276).

These losses in revenue have been sustained notwithstanding railways have made sweeping reductions in operating expenses. Operation costs were $11,300 per mile in 1921, while they were only $6,758 per mile in 1931, or only 60 per cent of the 1921 figure (R. 277).

The witness further testified (R. 277):

---

[7] Improved highways and larger and better equipment have increased the zones within which commodities can be trucked in competition with rail transportation. Some of these hauls extend for distances greater than 1,400 miles. 182 I. C. C. 292.

> "Collectively they indicate that the rail carriers now possess, by reason of the heavy increase in their investment, a transportation plant capable of rendering a greater service than ever before. While this is true, the last few years have witnessed a material decline in their tonnage and revenues. Their present low rate of return is in many instances insufficient to take care of interest on bonds, and other non-operating expenses."

The competition of trucks has been most severely felt in connection with less than carload traffic, although they have made material inroads in carload tonnage. In 1930 a typical Class I railroad originated only 40 per cent of its 1921 figure for less than carload traffic, and only 22.6 per cent of its 1923 total (R. 278).

In carload traffic for example,[8] during the four-year period from 1927 to 1930 railways lost to trucks 1,000,000 tons of cotton; 500,000 tons of cake and meal, 900,000 tons of animals and animal products, and 14,000 tons of canned goods. In this same period they lost 300,000 tons of less than carload freight. Other kinds of carload and less than carload traffic have been similarly diverted[9] (R. 279).

---

[8] "The truck has made important inroads into the carload traffic of the railroads. It is steadily increasing its penetration into the field of carload traffic * * * ." 182 I. C. C. 285-6.

[9] "Other commodities which customarily have moved by rail in carload lots, and of which there is extensive diversion, includes sugar, sugar beets, rice, canned goods, automobile tires and accessories, building ma-

A good example of the effect of truck competition on railways is shown in the movement of cotton. In 1927 more than 95 per cent of the 5,000,000 bales of cotton received by the Texas ports was carried by rail. In 1931 only 57 per cent of the cotton was carried by rail to the ports. Trucks carried only 249,296 bales of cotton in 1927, while in 1931 they carried 1,475,942 bales over the highways to the Texas ports, representing a 488 per cent increase. Practically all of this cotton was transported by contract carrier trucks and resulted in very serious losses to the railways[10] (R. 280. See also testimony of S. G. Reed R. 250).

This heavy traffic diversion has seriously affected ever phase of railway operations. It has produced unemployment; jeopardized their financial position,[11]

---

terials (brick, cement, stone and gravel), logs and lumber, furniture, paper, pulp board, foundry products, machinery (including heavy machinery requiring special truck equipment), paints and varnishes, beverages, baled hay and straw, leaf tobacco, fertilizer, and household goods." 182 I. C. C. 299.

[10] The railroads direct loss from August 1, 1930 to December 1, 1930 on cotton moving to the four Texas ports named above was estimated at $3,043,743." * * * 182 I. C. C. 294.

"The situation is rendered particularly grave by reason of the large dependence of many southern and southwestern railroads on movements of cotton and its derivatives." 182 I. C. C. 296.

[11] "Traffic diversions from Class I railroads have resulted, without allowing for expected increase, in a loss of gross passenger revenue of $274,000,000, comparing

seriously impaired their service, and otherwise adversely affected the public interest. This witness expresses the opinion that unless this diversion of traffic from railways to trucks is stopped, a great many of the railroads will be forced into bankruptcy[12] (R. 283-284).

The witness, A. J. Stone testified to the same effect (R. 223 to 225). A study of the testimony of these two witnesses will present a comprehensive picture of the serious nature of this phase of the problem in Texas.

(e) *Effect on Common Carrier Truck Lines.*

The Court found:

> "The inevitable result of the continuance of the enormous increase of so-called private carriers for hire and the continual decrease in the number of common carriers holding certificates of public convenience and necessity will be the practical disappearance altogether of common carriers from the roads." (Finding XXIV, R. 176.)

1929 with 1923, or of $418,000,000, camparing 1930 with 1923, and in a loss of gross freight revenue which also runs into the hundreds of millions, aside from the effects of rate reductions made to meet motor competition". 182 I. C. C. 321.

[12] "Many abandonments of short line railroads and of branch lines of large systems have occurred. Motor competition increasingly accounts for such abandonments. In the last five years nearly 75 per cent of all applications for certificates to abandon rail operations have mentioned motor competition as a factor." 182 I. C. C. 327.

This finding is based in part upon the testimony of Mark Marshall, Director of the Motor Transportation Division of the Texas Railroad Commission. He testified that under a prior act which did not give the Commission power to regulate rates of contract carriers that there was a constant decrease in the number of common carrier certificates issued by the Commission and a corresponding greater increase in the number of contract carrier permits issued.[13] For example, on December 31, 1929, there were 462 common carrier truck lines in the State while in August, 1931, there were only 364. In this same period contract carriers increased from 2,190 to 3,168. Of course the vast majority of hauling was done by trucks which were not under the supervision or regulation of the Commission under the prior act. The witness Marshall said:

> "The use of the highways for hire cannot be successfully supervised and regulated unless the Commission is empowered to fix minimum rates. One of the results of the enforcement of the former law was to materially reduce the number of common carrier trucks and greatly increase the number of private or contract carriers. This tendency was so marked during the past year or so that had the law remained in force, it is my opinion that the common carrier truck or Class A truck operator would have

---

[13] "Contract carriers can seek out profitable lines of work and quickly abandon unprofitable ones, while certificate holders bear greater cost in providing service and also can not abandon their certificate without forfeiting the right to engage again in such operations." 182 I. C. C. 359.

been forced to surrender his Class A certificate and engage in private and contract carriage only. The contract or private carrier was not required to charge the rates fixed by the Commission for common carriers. The result was that there was a constant decrease in the rates charged by the private or contract carriers. This resulted in a material decrease in Class A revenue, more inefficient service on their part, and a general lowering of Class A standards. Ultimately, practically all of the property hauled over the highways of this State would have been carried by unregulated and unsupervised trucks. This would have brought about the same condition which existed prior to 1929, when regulation was first undertaken by the Commission. Our experience has shown that without proper regulation, the number of trucks hauling commodities would have greatly increased, adding to the congestion of the highways and endangering the safety of the traveling public to that extent. As I stated, the only way this condition can be corrected is in the manner provided by House Bill 335, which is now in force. If the Commission is empowered to fix a minimum rate for contract carriers, the confusion and chaos which existed prior to its effective date can be eliminated. The character of drivers will be raised, the number of trucks operating on the highways will be reduced, the traveling public and the property hauled on trucks will be indemnified against injury to the person and against loss or damage of cargo." (R. 246-247.)

C. V. Terrell, Chairman of the Railroad Commission, testified to the same effect (R. 244-245). He added, however:

> "* * * the experience the Commission has had in endeavoring to regulate highway transportation demonstrates that unregulated contract carriers as defined by the present law, effectually prevent the primary purpose of fostering and conserving for the general public welfare that commercial transportation on the highways which it has been the purpose of the laws of Texas and the rules of this Commission to foster and protect. The common carriers, who have seen fit to take out certificates of convenience and necessity under the laws of Texas heretofore have found the cream of business taken by Class B motor carriers, as defined by the former law, and contract carriers, as defined by the present law, who solicit and take that business which is convenient for them to handle and who underbid the common carriers for such business, thus thwarting the purpose of the regulatory laws mentioned.
>
> "If only the Class A motor carriers under the former law are regulated under the present law, and the Class B motor carriers under the former law, and the contract motor carriers, as defined by the present law, are not regulated as to their rates, the Class A motor carrier under the former law, and all other common carriers, as defined under the present law, will be so seriously affected by unfair competition that a chaotic state will exist to the great detriment of the public. The control of contract carrier service is so inextricably related to common carrier service that it is necessary to fix its rates and

> regulate its service in order to have an orderly and systematic transportation service which will not result in discrimination for or against any community or individual." (R. 244-245.)

The witness F. W. Ruby testified that he operates a common carrier truck line under a certificate of public convenience and necessity issued by the Railroad Commission of Texas. His rates and service are regulated. He has been operating for a number of years. Within recent years the number of contract carriers have greatly increased. Their rates and service cannot be met by common carrier trucks. If they are not regulated and controlled, his business will be destroyed and he will have to withdraw from the business of carriage as a common carrier (R. 225-226).

The witnesses D. C. Sanders (R. 227), H. P. Brown (R. 227), L. C. Abbott (R. 227), and M. S. Day (R. 227), each operate common carrier truck lines, and testified substantially to the same effect as the witness Ruby.

(f) Effect on Shippers, Commodities and Communities

It is here that the contract carrier has done the greatest injury. The court found that unregulated contract carriage produced discriminations and preferences as between commodities, shippers and communities.[14]

---

[14] "Subject to no regulation in most jurisdictions, and limited regulation in others, contract carriers have a free hand in making their charges; they can make changes readily and can freely discriminate between

Its findings in this respect are as follows:

> "The Legislature, in effect, found that the lack of regulation of minimum rates of contract carriers operating at will over the highways selecting particular shipments and desirable traffic to handle served to produce discrimination and preferences as between communities, shippers and commodities, with a resulting disorganization, disruption and disturbance of transportation service not in the interest of the public, and we think the evidence not only does not overcome, but, on the contrary, supports this view." (Finding IX, R. 173.)
>
> "The Legislature, in effect, found that the regulation of the minimum rates to be charged by contract motor carriers for hire will serve to stabilize highway and railroad transportation and eliminate discriminations, preferences and rebates, and we find the evidence supports this view." (Finding X, R. 173.)

The witness Robert Mayer testified (R. 228) that contract carriers "have no uniform price as between different shippers. They discriminate in their rates

---

shippers, types of traffic and communities. * * * Empty or partially filled trucks returning to their headquarters everywhere contribute to disorderly contract rates and indirectly to disorderly common carrier rates. * * * Where shipments are seasonal, as in the fruit and cotton industry, wildcat competition is a further disorganizing factor. Truckers of limited financial backing are sometimes driven to quoting extremely low rates to meet their immediate cash requirements." 182 I. C. C. 306.

and service as between shippers of the same commodity for identically the same service." The inability to know what charges will be made has made business so uncertain as to become an unprofitable undertaking.

With reference to these discriminatory practices the witness C. E. Hinds testified (R. 271):

> "In the past unregulated contract motor truck carriers have maintained no system of rates or no publications of any character which would inform their customers of the charges which would be made for a given quantity of transportation. Generally these rates have been made upon competitive basis as between the contract truck carriers and as between different lines of business. Different rates have been in the past frequently made by the same contract motor truck carriers for identically the same quantity and character of transportation service. This character of discrimination as between competitors has in the past demoralized business conditions and materially affected the ability of the distributors of commodities to compete with each other in a given consuming territory."

To the same effect Sam Hanna testified (R. 270):

> "The belief is shared by virtually all Texas wholesale grocers that should motor trucks be allowed to continue to operate without being regulated, chaos will result to the entire Texas jobbing and retail grocery trade, as well as other industries, for without regulation and no uniform cost of transportation, discrimination between jobbers and retailers is created, which

> discrimination extends to towns or communities, and ultimately to the consumer.
>
> "The stabilization of transportation costs will, in my opinion, result in stabilization of industry generally, and will permit those engaged in industries to establish the approximate cost of one of the principal factors of overhead expense."

These witnesses and others established that contract carriers have discriminated between commodities, shippers and communities, and that such discrimination is even practiced in cases where the conditions of operation and commodities hauled are identical.

(*g*) *Business Conditions.*

The Court found:

> "In its relation to business, unregulated and unstabilized transportation such as afforded by contract carriers on the highways of Texas, in the opinion of the Legislature of Texas as declared in the Act, is detrimental since commercial transportation, as a factor in business, should be reasonably stabilized and offered by all who compete in the same field upon substantially the same terms, and the court finds that the evidence supports this view." (Finding XXIII, R. 176.)

In the business of distributing general merchandise, transportation charges and practices are a material factor in determining the price paid by consumers. It is necessary to know the transportation charges in advance of the sale of commodities generally in order

to meet the competition of others engaged in the same line of business.[15] It is equally important that the transportation costs of competitive concerns be on a comparable basis.

The witness G. A. Trumbull, President of Huey-Phillips Hardware Company, testified (R. 264):

> "Since the development of truck transportation and prior to the regulation of the contract carriers our transportation costs varied almost from day to day and as a result, there was no established basis of these costs that could be laid down as a guide to enable us to determine the price at which we could sell our merchandise. Furthermore, it gave those engaged in the retail business an opportunity to take advantage of the wholesaler and manufacturer by stating that he could buy merchandise laid down at a cost less than that at which such manufacturer or wholesaler, under this arrangement for transportation, could charge, and the manufacturer and wholesaler were not in a position to contradict or call into question such assertion, for the reason that they knew that the transportation costs were dependent upon the individual whim of each truck operator. If transportation costs are regulated these difficult problems in the operation of our business

[15] "There are disadvantages in using trucks. Their inability to take all classes of traffic or traffic going to all distances makes it necessary for shippers to deal with both trucks and railroad. * * * Others mention the lack of a known basis of rates making it necessary to guess at what competitors are paying, and to indulge in bidding for rates, particularly those for back-haul movements." 182 I. C. C. 301.

will have been eliminated. We will be able to know, with a reasonable degree of certainty, our own transportation costs and those of our competitors and we can gauge the price of our merchandise accordingly. Furthermore, the retailer will not be in a position to put down the price of our merchandise by saying that he can purchase it elsewhere, and on account of a less cost of transportation, obtain such merchandise at a lower cost than the price at which we sell it.

"In other words, transportation costs are such an important element to the successful operation of a business that a slight variance will be the determining factor in the success of a business similar to the one of which I am president. The establishment of uniform and minimum rates upon the part of the carriers, whether common or contract, is essential to the stabilization of industry generally, and particularly, is it true of the industry in which I am engaged".

The witnesses H. B. Lockett (R. 257), Melrose Holmgreen (R. 259), J. E. Farrow (R. 260), E. V. Rhodes (R. 262), J. P. Everheart (R. 265), Ben E. Keith (R. 266), Ira Meredith (R. 267), E. C. Price (R. 267), A. J. Scrivener (R. 268), C. E. Hinds (R. 270), and Sam Hanna (R. 269), are each engaged in different businesses and testified to the same effect.

A. J. Scrivener, who is engaged in the business of distributing and manufacturing food products, stated (R. 268) that 85 per cent of the movement of commodities from wholesale and branch wholesale houses to customers is now done by motor trucks.

All of the witnesses agree that in the absence of regulation of the rates of contract carriers it will be

impossible to quote stabilized prices from day to day. They state that since the businesses in which they are engaged are operated upon a narrow margin of profit that the discriminatory rates and practices of contract carriers have had a disastrous effect on them.

(*h*) *Producers and Interior Markets.*

Contract carrier operations have had the same far-reaching and injurious effects upon the producer and his interior markets as have been noted with respect to businesses generally.[16]

---

[16] "Trucking has rendered certain local marketing points of less importance than heretofore." 182 I. C. C. 295.

"The trucking of livestock not only lessens the opportunities of local shipping agencies, whether livestock cooperatives or individual buyers, whose primary function has been that of assembling small lots for carload movement, but also affects the competitive relationship of the markets themselves by introducing new cross-country movements and changing the spread in the cost of reaching various markets." 182 I. C. C. 289.

Livestock trucks and those hauling cotton and other seasonal products "have large amounts of unused capacity on the return movements. They therefore bid for return loads of feeds, fertilizers and general merchandise used on farms in communities through which the trucks pass. * * * The competition between trucks for this outbound traffic forces the rates down with the result that jobbers at local points have lost a large part of their business, and the railroads part of their less than carload traffic." 182 I. C. C. 289.

For example, consider cotton which is the principal crop produced in Texas. The effect of unregulated contract carriage upon that commodity and its marketing and upon those who produce it is shown by the testimony of Lawrence Westbrook who said (R. 257):

> "I have had experience as a cotton merchant, as a cotton producer, and as the owner of cotton gins. Practically my whole business life has been engaged in different phases of the cotton business, and especially for the past 10 years I have studied the problems of cotton marketing from the producer's standpoint. I formerly organized and operated a cotton cooperative association, and the past year I organized for the State of Texas the Texas Cotton Cooperative Association.
>
> "The destruction of the interior cotton market is an economic catastrophe for the producer, as well as for the general business structure in the interior. Any saving resulting to the producer from transportation charges by the trucking of cotton by motor truck has not, in my opinion, compensated the producer for his loss resulting from the disruption of his customary competitive local interior markets, which disruption and destruction of such local interior markets has been largely contributed to by the heretofore ineffectual regulation of the transportation of cotton by motor truck".

Contract carrier operations have produced similar problems with respect to practically all of the farm products of the State and have similarly demoralized the marketing of those products.

(*i*) *Public Interest Generally.*

It was established that motor truck transportation cannot adequately serve the people of Texas in all their transportation needs (Finding XI, R. 174). Since this is true the regulation of the minimum rates of contract carriers is necessary in the public interest to conserve and maintain an adequate transportation system capable of serving the entire needs of the people of Texas (Finding XII, R. 174).

It was established also that there has been an enormous increase in the number of contract carriers within recent years, and that the business which they now conduct is a very large factor in commercial transportation. In the aggregate they have produced a serious problem (Finding XXII, R. 176).

It is essential, in the public interest, that all available carriage service, including common carriers by rail and by road, be coordinated in order that the public may have a safe and dependable transportation system. This cannot be accomplished unless private carriers operating on the same roads with common carrier trucks and parallel to the lines of railway are brought under just and reasonable regulation and their service is brought into relation with that of other carriers (Finding XXV, R. 176).

The court found that the granting to the Commission of the power to grant or refuse a permit to contract carriers, power to fix minimum rates, the forbidding of rebates and discriminations by contract carriers and

the other regulations of the act applicable to them are reasonably designed to effect the State's declaration of purpose and policy that the use of highways by motor carriers for hire is a business affected with a public interest. It further found that the evidence in this case supports the legislative declaration that such business is one affected with a public interest (Findings XXVIII and XXIX, R. 177-178).

With such a vivid picture of highway conditions before it, the trial court was justified in declaring:

> "The record in this case teems with evidence supporting the State's declaration of purpose and policy that the use of the highways is affected with a public interest and that the conduct of unregulated business over it is bringing about the prevalence of the mischiefs and evils which the legislation in question is designed to avoid" (R. 138).

Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 203-4, may have exercised a prophetic discernment of such conditions on the highways and the vital public interest involved therein when he declared:

> "Within the State power then, is that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government; all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turn-

> pike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a specific purpose, or is clearly incidental to some power which is expressly given."

The inherent public interest involved in the use of public highways was recognized in the fundamental law of Texas, for in adopting its Constitution it was declared in Section 3, Article 12:

> "The right to authorize and regulate freights, tolls, wharfage, or fares levied and collected or proposed to be levied and collected by individuals, companies or corporations for the use of highways, landings, wharves, bridges, and ferries, devoted to public use, has never been and shall never be relinquished or abandoned by the State, but shall always be under legislative control and depend upon legislative authority."

And in Section 5 thereof:

> "All laws granting the right to demand and collect freights, fares, tolls or wharfage, shall at all times be subject to amendment, modification or repeal by the Legislature."

These two constitutional provisions clearly evidence a purpose and intention of the State from earliest times to preserve and appropriately exercise its power to control the freights, fares and charges of those using its highways in the public interest.

The provisions of this act are only a part of the State's scheme to regulate its internal commerce which includes "the power to enact all appropriate legislation for its protection or advancement; to adopt measures and foster, protect, control and restrain". *T. & N. O. Railroad Company v. Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548.

Appellants strongly rely upon this Court's pronouncements in *Smith v. Cahoon, Frost v. Commission, Michigan v. Duke,* and *Buck v. Kuykendall, supra.*

We believe the brief discussion of the Duke and Kuykendall cases, under our first proposition, show their inapplicability to this case. In both those cases an interstate carrier was involved. In the Kuykendall case the State attempted to stop such a carrier at the State line. Here no such thing is attempted. That question was settled for this law in *Sage v. Baldwin,* 55 Fed. (2nd) 968. There is no attempt here to impose anything but the strictly police regulations of the act upon interstate carriers. Neither does the act undertake to impose common carrier burdens and duties upon contract carriers of either class. Both of those cases were evidences of this Court's determination to leave interstate commerce free of unreasonable burdens.

But it appears from close examination of the opinion in the Duke case that there was evidently no showing whatever that plaintiff's business was affected with a public interest. He had a contract to carry for three concerns, and limited his activities to his contract. Mr. Justice Butler, in his opinion, said:

> "He does not undertake to carry for the public and does not devote his property to any public use. He has done nothing to give rise to the duty to carry for others. The public is not dependent on him or the use of his property for service; has no right to call on him for transportation."

We take it the statement that the complainant "does not devote his property to any public use", was merely a statement of facts deducible from the record then before the court and was not a statement of a legal conclusion in any manner applied to a state of facts similar to the one now before this Court. If this be true it deprives the opinion of any controlling effect in a case where facts are presented showing that contract carriers on the highways of a State are affected with a public interest. Duke, however, was an interstate carrier.

In the Frost case there is presented a holding to the effect that a State cannot require contract carriers to become common carriers; that to do so would be to violate Federal rights, particularly under the Fourteenth Amendment.

In discussing the issues, the court took special note of the argument presented by the State, that, since these contract carriers could be legally excluded from the highways, the granting of a license to conduct their business thereon could be accompanied with any condition the State might wish to impose. But this was met with the view that a Federal right could not be conditioned away; in other words, that the State could refuse the license if it wished, but if granting it, could

not exact as a condition of the grant the abandonment of rights under the Federal Constitution.

The important consideration in analyzing that opinion is that the Supreme Court of California assumed the State had a right to regulate the business of contract carriers merely upon the consideration that it could grant or withhold from such carriers the right to conduct their business on its highways. Again, it is important to note that there was no showing made and no contention that the business of this particular carrier or the class of which he was a member, was affected with a public interest. It is necessary, however, to take note of certain language in the opinion rendered by Mr. Justice Sutherland, as follows:

> "It is very clear that the act as thus applied is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved. This, in effect, is the view of the court below plainly expressed."

We cannot disregard the boundaries set forth in that statement. In order to justify what the California Legislature attempted to do, this Court found it indispensable to discern in the enactment proper regulation of the use of the public highways. As plainly does it also appear that regulation of the business of those engaged in using the highways was put aside as a matter of course. What the State of Texas proposes

to do in the instant case is not only to regulate the use of its highways, but also to regulate the business of the contract carriers making use thereof, and the right to do so is predicated at least in part upon the consideration that contract carriers are shown to be engaged in a business affected with a public use. Nothing of the sort appeared in the California case.

We now come to the Cahoon case. The State of Florida passed a regulatory statute affecting contract carriers. They were required to procure certificates of convenience and necessity before being permitted to operate. They were required to give a bond running in favor of the public and of the shippers who patronized them, and otherwise were required to be subject to regulations ordinarily affecting common carriers.

Mr. Chief Justice Hughes, in rendering the opinion of the Court, held that the regulations were such as to impose upon those contract carriers identical obligations with those of common carriers, and that it would be impossible to differentiate, in the light of these facts, between the effect of the Florida statute and the effect of the California statute discussed in the Frost case.

Among other things we find that the Florida statute, as construed by the Court, is based upon the State's power to regulate the use of its highways. Note this language:

> "No separate scheme of regulation can be discerned in the terms of the act with respect to those considerations of safety and proper oper-

> ation affecting the use of the highways, which may appropriately relate to private carriers, as well as to common carriers. All carriers within the act whether public or private are put by the terms of the statute upon precisely the same footing. * * * Such a scheme of regulation of the business of a private character, such as the appellant's, is manifestly beyond the power of the State."

We wish to note especially the last sentence:

> "Such a scheme of regulation of the business of a private character, such as the appellant's, is manifestly beyond the power of the State."

The Court does not say that a similar scheme of regulation applied to some contract carriers or to all contract carriers under some circumstances, even though regulating the business itself, would be beyond the power of the State. The import of the language is limited in that it can have application only to the peculiar status of the appellant in that case and to the peculiar circumstances surrounding his business.

There is no reference whatever in that case to an effort on the part of the State of Florida to show that contract carriers in general had created such a problem on the highways of the State as to enforce the conclusion that the business was affected with a public interest. On the contrary, as in the Duke case and the Frost case, it appears that the Court stays the hand of the State, in each instance, from regulating the business of the carriers involved, because under the circumstances before the Court the State's power to do so did not appear.

It is manifest, however, that the constitutional limitations found in the Fourteenth Amendment cannot stay the hand of the State in its effort to regulate the business of contract carriers on its highways, where it has been made to appear, as in this instance, that the business is affected with a public interest, and that the regulations provided are demanded at the hand of the sovereignty in the interest of the public welfare.

For all of these reasons, we submit that the record supports the legislative declaration and the Court's finding that the class of contract carriers who are reached by the act are engaged in a business affected with a public interest and justifies the regulations which have been applied to their operations on the public highways.

III.

The act imposes substantially different schemes of regulation upon common and contract carriers and there is a clear differentiation between the two classes. It authorizes no greater regulation of appellants' business than is essential to the accomplishment of the valid purposes of the act. (In answer to Appellants' Point III, R. 290-291.)

There has necessarily been considerable discussion of this proposition under Points I and II, and all unnecessary repetition will be avoided. A casual reading of the act is sufficient to show the clear line of separation which it draws between contract and common carriers, and that the burdens imposed by it upon contract carriers are less onerous than those applicable to common carriers.

The police regulations having direct relation to traffic safety and highway protection and convenience, are applicable alike to both classes and are not in controversy. Therefore, we now parallel for comparison only those obligations imposed upon the respective classes which are brought in question by the appellants:

(1) Common carriers must hold themselves out to the public to perform any and all transportation services for all members of the public to the limit of the capacity of the common carrier facilities. This is the burden of the common carrier.

Contract carriers have no such burden and the act in question imposes none.

(2) Common carriers are not defined by the act. They are left by definition exactly where they are by judicial decision (R. 13).

Contract carriers are not declared to be, nor are they required in fact to become common carriers. They are defined as "motor carriers" operating "other than as common carriers" (R. 13).

These distinctions have been sufficiently discussed under propositions numbers I and II.

(3) One desiring to operate as a common carrier is required to secure a certificate of convenience and necessity. To procure a certificate, a common carrier must show in detail in his application his exact route, the condition of the highways, his schedule, the routes and service of other carriers serving the affected ter-

ritory, the inadequacy of existing transportation facilities, and wherein additional service or facilities are required, his financial ability, his responsibility, and that of his organization and personnel; a description of his vehicles, the location of depots or termini proposed to be used; his experience in the business of transportation and the character of bond or insurance he proposes to give to protect the public (Secs. 9 and 10, R. 20-22).

One desiring to operate as a contract carrier is required to procure only a permit. An applicant for a permit is only required to show his financial condition, the nature of his proposed service, substantially the territory to be covered including the condition of the highways and a description of his vehicles (Sec. 6, R. 17-18).

(4) The common carrier must assume the full burden of proof in support of his application, and particularly must establish that public convenience and necessity require the particular operation he proposes (Sec. 3, R. 13-14; Sec. 8, R. 20; Secs. 9 and 10, R. 20-22).

A contract carrier is not necessarily required to assume any burden of proof. He is required to file his application and a hearing is provided for (Secs. 11 and 12, R. 22-24). The act merely provides that no permit shall be granted if the Commission be of the opinion that the proposed operation will impair the efficient public service of any authorized common carrier then adequately serving the same territory (Sec. 6(*c*), R. 18).

(5) Common carrier schedules are regulated by the Commission (Sec. 4(*a*), R. 14).

It possesses no such power with respect to contract carriers.

(6) Common carrier service is subject to regulation (Sec. 4(*a*), R. 14).

Contract carrier service is not subject to regulation.

(7) Common carrier certificates may be transferred (Sec. 5, R. 15-17).

Contract carrier permits may not be.

(8) The application fee for a common carrier is $25, with an annual fee of $10 per vehicle thereafter (Sec. 17, R. 29-30).

The fees for a contract carrier are only $10 on application with similar annual fees (Sec. 7, R. 19-20).

(9) The Commission is empowered to prescribe specific rates, maximum or minimum, for a common carrier (Sec. 4(*a*), R. 14).

For a contract carrier it may prescribe minimum rates only, and then only where such carrier is operating in competition with common carriers, this power being predicated solely upon the necessity of protecting the public interest involved (Sec. 6(*aa*), R. 19).

We wish to call special attention to the fact that, under the provisions of Section 6(*c*), contract carriers, in order to secure a permit, are not required to prove the public convenience and necessity for their proposed operations. A contract carrier is entitled to a permit if it appears that there is no common carrier

then adequately serving the territory involved and he is likewise entitled to a permit if it appears that his proposed operation will not impair the service of a common carrier or carriers then serving the territory involved. In either of these cases a contract carrier is entitled to a permit without regard to the public necessity for his service and without regard to any public convenience which may be served by his operation.

These illustrations are sufficient answer to appellants' contention that the act imposes the same burdens upon common and contract carriers. That the two classes are separately and distinctly treated is too obvious for further comment. Moreover, these examples further demonstrate that the act does not lack the differentiation between the two classes which the Cahoon case clearly indicated is necessary.

Appellants contend the act unreasonably regulates their business. We have shown, under our first proposition, that it does not require them to devote their property to any different or greater public use than they had already voluntarily devoted it; that the limited regulatory powers of the Commission are extended only to those phases of their operations which adversely affect the public welfare and that such regulations as are imposed upon them are reasonably related to the valid purposes of the act.

Under our second proposition we presented a summary of the facts of record, together with the findings of the trial court, which show the effect of the unregulated operations of appellants and others of their class. The undisputed facts show that within the past five or six years contract carriers have practically destroyed

the regulated common carrier truck lines, and the trial court found that a continuance of these conditions will completely destroy them; that contract carriers have seriously impaired railway service and have made such inroads upon their business that all have sustained large financial losses, and that many of them are threatened with bankruptcy; that they have destroyed interior markets; that they have discriminated between shippers and communities and have injured business conditions generally.

By reason of these facts we hold that the businesses of appellants are affected with a public interest. We have already cited and discussed the authorities supporting this view. We have shown that the regulation of their rates and practices is reasonable and is essential for the preservation of the public interest involved.

If we are correct in these conclusions, then appellants' argument that the act arbitrarily and unreasonably regulates their business is unsound.

In looking back one necessarily observes the close relationship which has always existed between means of transportation and the progress and development of nations. Too, it is interesting to note how one form of transportation has displaced another through the centuries; how man has constantly struggled to annihilate time and distance between his markets.

The establishment of shorter, better or quicker routes and means of transportation has usually been accompanied by change and growth. When the steamship displaced the sailboat its effect was felt immediately. It remained for the railway, however, to

revolutionize land transportation.[17] Its effect upon the development of our own country is readily apparent. It is no exaggeration to state that this nation could never have developed into its present preeminent position in industry and agriculture without rail transportation. The evidence shows that it cannot maintain this position without railroad transportation. The evidence further shows that motor vehicles cannot adequately serve the transportation needs of the people.

The introduction of motor vehicles on public highways has greatly modified the transportation problems of this State and of the Nation. It must be acknowledged, of course, that they have come to have a definite and important function in our transportation scheme and no doubt are here to stay.

The specific purpose of the act here involved is to define that function; to ascertain as nearly as possible

---

[17] "Historically speaking, the railroads have brought into being over a span of 100 years a transportation system which was calculated to develop and serve every essential need for land transportation. Their systems reach into practically every county of the nation and embrace a network of interdependent main, subsidiary, and feeder lines. The cost of serving many points which neither originated nor received traffic in sufficient volume to make the service rendered profitable was borne from the returns of the system as a whole. Communities developed which were solely dependent on a permanent year-round rail transportation service. Furthermore, some low-grade traffic drew support from the greater rate-paying ability of high-grade traffic. Highway and other transportation tends to destroy this unity." 182 I. C. C. 363.

the most useful and economical field for the truck in serving the State's transportation needs. In short, it seeks to coordinate motor transportation with other established transportation agencies for the general good.[18]

The chief obstacle to the accomplishment of that purpose is the so-called contract carrier. His operations have attained such magnitude that he can no longer be ignored and if he is permitted to continue his operations without restraint or regulation, he will produce greater mischiefs.

Before the advent of motor transportation, private carriers created no serious difficulties in the field of

---

[18] "The public has permitted uneconomic developments to occur within an industry capable of great public service. It is therefore likely that adequate regulation would strengthen and stabilize the industry to the extent it controls the number of operators and the amount, kind, and extent of service. Coordination, under regulation, of motor and rail transportation may have the same effect. 182 I. C. C. 363.

"It is admitted by all, we presume, that most traffic now moving by motor vehicle would, in the absence of the motor vehicle, be moved by rail if it moved at all. There is extensive evidence of record showing the effect that motor vehicle transportation has had on the traffic and revenue of railroads. But the essential purpose of this inquiry is constuctive and, we take it, its aim is not so much to discover a means for the elimination of this competition between the old and new form of transportation as it is to learn how the old form and the new form can best and lawfully be fitted into the general transporation scheme so that each may serve the public within its most economical sphere". 182 I. C. C. 273.

transportation. "Private carriers" were judicially defined at a time when their field of operations were limited and were only of small local consequence.

Modern highways and the motor truck have created a new type of carrier. Whatever he should be called, we have shown he represents a distinct class of carrier to which the act in question applies a separate and distinct set of rules and regulations.

For these reasons we submit that appellants' argument under their third proposition is unsound. The Court's action upholding the legislative judgment in this regard should be sustained.

IV.

Section 6(d) authorizing the issuance of special permits for the transportation of certain named commodities creates no unlawful discrimination because any person operating thereunder is subject to the regulations applicable to the class of which he is a member. (In answer to Appellants' Point IV, R. 291.)

(*a*) *Even if section* 6(*d*) *is not open to that construction, appellants are in no position to complain since they do not haul those commodities and have shown no injury.*

(*b*) *The act is clearly severable, and if section* 6(*d*) *is invalid, it, and not the act, must fall.*

Section 6(*d*) authorizes the Commission to issue special permits to persons desiring to engage in the business of hauling livestock, mohair, wool, milk, livestock feedstuffs, household goods, oil field equipment, timber

when in its natural state, farm machinery and grain. The Commission is given authority to fix and prescribe special terms, conditions and restrictions governing such operations.

It will be observed that the special permit provision is a part of a section dealing with contract carriers. Evidently, the Legislature believed that most persons carrying those commodities would operate under contracts. However, this will not necessarily be true in all cases, since many of them will, in fact, be common carriers.

In either event, one operating under a special permit is a "motor carrier" as that term is defined in Section 1(*g*) (R. 13). As such he is subject to all the applicable provisions of his class, whether he be a common or contract carrier. There is nothing in Subdivision (*d*) of Section 6 to indicate that the Legislature intended otherwise.

Appellants take the position that persons operating under this subdivision are not subject to the rate and service regulations applicable to their particular class. They would have the court adopt such a construction in order that there might be merit in their contention that the situation here is identical with that in *Smith v. Cahoon, supra.*

If there be doubt about which construction is correct, this Court will adopt the one which avoids "grave and doubtful constitutional questions". *Texas v. Eastern Texas RR. Co.,* 258 U. S. 204; *U. S. v. Delaware & Hudson Company,* 213 U. S. 366, 407-8

In candor, we feel it our duty to advise the Court that the Commission was in some doubt of the meaning of this subdivision in the beginning. The question was submitted to the Attorney General of Texas. In an official opinion he construed the act to the effect that persons operating under special permits are subject, in all substantial particulars, to those provisions of the act which are applicable to the particular class to which they belong. In other words, special permit operators are either contract or common carriers and must submit to regulation as such. This construction of the act is now adhered to by the Commission.

Thus construed and enforced, Section 6(*d*) makes no discrimination either in favor of or against any commodity and the vice pointed out in the Cahoon case does not apply.

We believe the construction we have placed on Section 6(*d*) is the only reasonable one which could be adopted when it is considered in connection with the broad purposes of the act and its various provisions. Moreover, it should be observed in this connection that in this case the court is free to judge the meaning of the act for itself and without feeling bound by the construction of a state court thereon. Herein again the situation differs from that in the Frost and Cahoon cases.

(*a*) *Even if section* 6(*d*) *is not open to that construction, appellants are in no position to complain since they do not haul those commodities and have shown no injury.*

There is nothing in the record of this cause to show that appellants have suffered any injury or prejudice

whatever as a result of the Commission's issuance of special permits. They have not applied for such permits themselves and, therefore, have not been denied one. They do not haul the commodities named in Section 6(*d*). So far as the facts in this case show, those operating under special permits stand on the same ground and are subjected to the same burdens as other carriers under the act.

Even if the Commission should issue permits under such terms and conditions as to discriminate against appellants and others, complaints should be made against the order of the Commission. It would be the Commission's order granting the permit which was discriminatory and not the law under which the Commission acted.

The trial court disposed of this contention of appellants as follows:

> "We may, in passing, notice but to reject it, the complaint that the act is invalid because Sub. (*d*) of Sec. 6 gives the Commission authority to grant special terms to carriers of certain kinds of goods, thus working a discrimination. Of this complaint it is sufficient to say that it will be time enough to make it when rights have been infringed by action under the section. If plaintiff takes out a permit, and the Commission thereafter, under authority of the section, attempts unlawfully to confer a permit upon another on less onerous terms, plaintiff may then apply for relief. *Frost v. Oklahoma,* 274 U. S. 719. Besides, this section is in terms made separable from the rest of the act, and if it is invalid it, and not the act, will fall" (R. 140).

(b) The Act is Clearly Severable, and if Section 6(d) is Invalid It, and Not the Act, Must Fall.

While we are confident there is no merit in appellants' position under this proposition, it calls for a brief discussion of the doctrine of severance. As the trial court stated, if Section 6(*d*) is invalid it, and not the act, will fall.

This is true, first, because the act is remedial in nature and will be liberally construed. It is designed to correct defects, mistakes and omissions in the administrative policy of the State. More specifically, it is a regulatory and administrative measure. The acts of Congress regulating commerce between the States are conspicuous examples of this character of legislation. This view of such an act is supported by the overwhelming weight of authority in this nation. *Doering v. Walters,* 140 N. E. 74; *Smith v. People,* 51 Colo. 270; *State v. Lipkin,* 84 S. E. 340; *Railway v. United States,* 232 Fed. 349; *Johnson v. Southern Tea Company,* 196 U. S. 1; *Schlemmer v. Buffalo Railroad Co.,* 205 U. S. 1; *Southern R. R. Co. v. United States,* 222 U. S. 20; *San Pedro R. R. Co. v. United States,* 213 Fed. 326; *Great Northern Ry. Co. v. United States,* 218 Fed. 302; *Railway Company v. Voelker,* 1932 Fed. 522; *Smith v. People,* 117 Pac. 612; *Texas v. Eastern Texas Railroad Co.,* 258 U. S. 204; *United States v. Delaware & Hudson Co.,* 213 U. S. 366, 407-8; *Clark v. Poor,* 20 Fed. (2d) 182, affirmed in *Clark v. Poor,* 274 U. S. 554.

Rules of construction which are followed by the courts of Texas are in complete harmony with the decisions which have been cited. *Ex parte Curly,* 255 S. W.

730; *White v. Maverick County*, 35 S. W. (2d) 107; *Ex parte Wright*, 82 Tex. Crim. Rep. 247; *Ex parte Parr*, 200 S. W. 404; *Griffin v. State*, 218 S. W. 494; *Russell v. State*, 228 S. W. 566; *Scott v. State*, 233 S. W. 1097; *Goforth v. State*, 241 S. W. 1027; *Lytle v. Halff*, 12 S. W. 610; *Ex parte Towles*, 48 Tex. 413; *Chambers v. Baldwin*, 274 S. W. 1011.

That the various provisions of this act are severable was definitely established in the case of *Sage v. Baldwin*, 55 Fed. (2d) 968.

There is another rule which it is important to consider in connection with the question of severance in this case. In Section 6(*d*) there is a clear expression of the legislative intent with reference to its divisibility (R. 18). Section 23 (R. 32) makes a similar statement with reference to each section, subsection, clause, sentence and phrase of the act. It is clear that the lawmakers intended the act to be divisible. Not only is this intention expressed with reference to Section 6(*d*) but with reference to every other requirement of the act. In the absence of such a declaration the courts do not feel free to apply the rules of severance liberally unless that which remains after the process leaves the purposes of the act substantially unaffected. *Williams v. Standard Oil Company of Louisiana*, 278 U. S. 241. Where, however, there is such a declaration, the rule as announced in that case is as follows:

> "The effect of the statutory declaration is to create in the place of the presumption just stated the opposite one of separability. That is to say, with the presumption that the Legislature intended the act to be divisible; and this presump-

> tion must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that, the invalid part being eliminated, the Legislature would not have been satisfied with what remains."

Appellants' contention that if Section 6(*d*) is invalid the whole act must fall is not well taken. The fact that there is a clear legislative expression that the act should be divisible is conclusive evidence that the Texas Legislature intended the act should be severable if necessary to meet any constitutional requirement.

V.

The act is not discriminatory as between carriers for hire and persons transporting their own property because the circumstances and conditions of operation are substantially dissimilar. (In answer to Appellants' Point V, R. 291.)

Appellants contend that the act is unlawfully discriminatory because it does not apply to persons transporting their own property in their own vehicles over the highways. They make the point that while contract carriers are required to obtain permits and are subject to rate regulation, no such obligations are imposed on those transporting their own property. The mere statement of their proposition suggests a sufficient answer to it. In making this argument they but emphasize the substantial differences existing between their situation and that of private hauls as an incident to one's business. Obviously, the Legislature cannot fix a rate

where none is charged. It cannot regulate a business on the highways where there is none to regulate.

Appellants complain they are required to secure chauffeur's licenses, but neglect to inform the court that a similar requirement is imposed on all truck operators in another act adopted by the Legislature (Chapter 282, Acts 1931, sustained in *Sproles v. Binford, supra*).

As a matter of fact, every regulation of the speed, weight, or dimensions of trucks which are imposed upon appellants apply uniformly and equally to all other persons operating trucks upon the highways. (See *Sproles v. Binford, supra.*)

It is true the act authorizes the Commission to adopt special regulations for the government of trucks carrying property for hire in the interest of safety and highway protection. But this Court will not assume, as appellants have done in their argument, that the Commission will perform its duties in an unreasonable or unlawful manner. Certainly they have not shown the existence of any such unreasonable or discriminatory regulations at this time.

As a matter of fact, the Texas Legislature, by this act, has simply applied regulations to carriers who have been judicially recognized as distinct and separate classes for a great many years. The differences between a class making a constant and extensive use of public highways as a place of business and that class making only a limited or incidental use in the ordinary and usual pursuits of life, are too obvious to require further discussion. The distinctions between the

classes are based upon the extent and manner of those uses, and that alone. As this Court said in *Sproles v. Binford, supra:*

> "But the legislature in making its classifications was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations which, by reason of their extensive as well as constant use of highways, brought about the conditions making the regulations necessary. *Continental Baking Company v. Woodring, supra.*"

The classifications and distinctions made by the act are based upon substantial differences of fact, and there is a rational basis for them. *Sproles v. Binford, supra; Lindsley v. Natural Carbonic Gas Company,* 220 U. S. 61; *Keokee Coke Company v. Taylor,* 234 U. S. 224; *Miller v. Wilson,* 236 U. S. 373; *Smith v. Cahoon, supra.*

Conclusion.

The act under attack in this cause seeks the accomplishment of great purposes. One of them is to prevent the abuses and discriminations universally practiced by the so-called "private contract carrier". The shipping public is entitled to equality and fairness in its freight bills. The contract carrier has not given it to them. Again, the public, because in the end it must depend upon the great common carrier systems, is entitled to efficient service and economical rates. The unregulated contract carrier has very seriously impaired the efficiency of that service and has contributed much to the conditions making increased rail rates nec-

essary. The act is intended to and will restore interior markets, stabilize business conditions generally, and will divert unnecessary and uneconomical hauls from the highways to the railways. In accomplishing these desirable ends the hazards and dangers for the usual and ordinary use of the highways will be greatly reduced and highway damage and maintenance expense will be kept within reasonable bounds.

As Mr. Chief Justice Hughes stated in the Sproles opinion:

> "It is said that the exception was designed to favor transportation by railroad as against transportation by motor trucks. If this was the motive of the legislature, it does not follow that the classification as made in this case would be invalid. The State has a vital interest in the appropriate utilization of the railroads which serve its people as well as in the proper maintenance of its highways as safe and convenient facilities. The State provides its highways and pays for their upkeep. Its people make railroad transportation possible by the payment of transportation charges.
>
> "It cannot be said that the State is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. The use of highways for truck transportation has its manifest convenience, but we perceive no constitutional ground for denying to the State the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain".

That statement encompasses the State's problem and sustains its power to solve it in the manner here proposed. However much difference of opinion there may be concerning the basis for the exercise of this power by the State, there is, as stated by the Chief Justice, no constitutional ground for denying it.

Respectfully submitted,

JAMES V. ALLRED,
Attorney General of Texas;
T. S. CHRISTOPHER,
Assistant Attorney General;
ELBERT HOOPER,
Assistant Attorney General;
Attorneys for Appellees.

CLAUDE POLLARD,
J. H. TALLICHET,
CHAS. C. HUFF,
W. M. STREETMAN,
A. L. REED,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 326.—October Term, 1932.

J. H. Stephenson, W. S. Finnegan, P. E. Arnett, et al., Appellants, *vs.* T. Binford, O'Brien Stevens, R. J. Martin, et al.	Appeal from the District Court of the United States for the Southern District of Texas.

[December 5, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought in the court below by Stephenson, one of the appellants, in which the other appellants intervened, against various officials of the State and counties of Texas, among them, the Governor, Attorney General, members of the State Highway Commission and of the State Railroad Commission, to enjoin the enforcement of certain provisions of a state statute hereafter described. The appellants severally were engaged in transporting freight by means of motor trucks over the highways of the state, between certain cities located within the state, under private contracts made with various named shippers, which contracts, among other terms, fixed the rate to be charged for the transportation services. While these contracts were in force and in process of being performed the state statute was passed, the effect of which, it is alleged, is to prohibit appellants from carrying out the terms, provisions and conditions of their contracts; to preclude them from transporting freight over the highways of the state under their contracts as private carriers to their great injury; and to subject them to criminal prosecutions. It is further alleged that an enforcement of the act will destroy the business of appellants, and unless restrained will cause them irreparable injury.

The following constitute the salient provisions of the act. Section 1 defines various terms used in the act. Section 3 provides that no common carrier of property for compensation or hire shall operate over the highways of the state without first obtaining a certificate of public convenience and necessity, and that no contract carrier shall thus operate without a permit so to do. Section 4 vests the railroad commission with authority to supervise

and regulate the transportation of property for compensation or hire by motor vehicle on any public highway of the state; to fix maximum or minimum, or maximum and minimum, rates, fares and charges in accordance with the specific provisions of the act; to prescribe rules and regulations for the government of motor carriers, for the safety of their operations, and for other purposes; to require each driver to have a license pursuant to an examination as to his ability and fitness. By the same section the commission is given broad powers of supervision and regulation in respect of matters affecting the relationship of the motor carriers and the shipping public, as may be necessary in the interest of the public; and also to supervise and regulate such carriers generally "so as to carefully preserve, foster and regulate transportation and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interests of the public." The railroad commission and the highway commission are directed to cooperate in respect of the condition of the public highways and their ability to carry existing and proposed additional traffic.

Section 5 contains various provisions relating to common carriers over the highways, and among other things requires them to have *certificates* of public convenience and necessity. Section 6 (a) provides that no motor carrier now operating as a contract carrier, or hereafter desiring to engage in so doing, shall operate until it shall have received a *permit* from the railroad commission which shall not be issued until the applicant has complied with the requirements of the act. Section 6 (c) directs that such permits shall be granted only after a hearing, and not if the commission be of opinion "that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory."

Section 6 (d) authorizes the railroad commission to issue special permits to persons desiring to transport for hire over the state highways livestock, mohair, wool, milk, and certain other commodities, upon such terms and under such regulations as may be deemed proper, having in mind the protection of the highways and the safety of the traveling public. Section 6aa gives the com-

mission authority to prescribe rules and regulations governing the operation of contract carriers in competition with common carriers over the highways, and to prescribe minimum rates to be collected by such contract carriers "which shall not be less than the rates prescribed for common carriers for substantially the same service."

Section 6bb provides that no permit to operate as a contract carrier shall be granted to any person operating as a common carrier holding a certificate of convenience and necessity, and that no certificate of convenience and necessity shall be granted to any person operating as a contract carrier, and that no vehicle shall be operated by any motor carrier with both a permit and a certificate.

Section 13 requires all motor carriers to give bonds and insurance policies, which among other things shall provide that the obligor will pay judgments recovered against the motor carrier based on claims for loss or damages for personal injuries, or "loss of, or injury to, property occurring during the term of said bonds and policies and arising out of the actual operation of such motor carrier." The section contains a proviso directing the Commission not to require insurance covering loss of or damage to cargo in amount excessive for the class of service to be rendered by the carrier.

Section 22(b) is a broad declaration of policy. It declares that the business of operating as a motor carrier of property for hire along the highways of the state is one affected with the public interest. It further declares that the rapid increase of motor carrier traffic and the lack of effective regulation have increased the dangers and hazards on public highways and made more stringent regulations imperative to the end that the highways may be rendered safer for public use, the wear and tear upon them reduced, discrimination in rates eliminated, congestion of traffic minimized, the use of the highways for transportation of property for hire restricted to the extent required by the necessities of the general public, and the various transportation agencies of the state adjusted and correlated "so that public highways may serve the best interest of the general public."

The case was heard by a statutory court consisting of three judges, under § 266 of the Judicial Code, U. S. C., Title 28, § 380, upon the pleadings and affidavits and other evidence. That court

delivered an opinion and denied an interlocutory injunction. 53 F. (2d) 509. Later, and upon final hearing, the court made findings of fact and entered a decree denying a permanent injunction. The case comes here by appeal from that decree.

Appellants assail the statute upon the following grounds. (1) That as applied to appellants, all of whom are private contract carriers, the result of the statute is to compel them to dedicate their property to the quasi-public use of public transportation before they can operate their motors over the highways, and thus to take their property for public use without adequate compensation and to deprive them of their property without due process of law. In other words, the alleged effect of the statute is to convert the private carriers into common carriers by legislative fiat. (2) That the business of appellants is not affected with a public interest, and the provisions of the statute so declaring in terms, or in effect, constitute an attempt to deprive appellants of their property without due process of law, and to abrogate their right of private contract. (3) That the statute by requiring appellants to obtain a permit in the nature of a certificate of public convenience and necessity subjects them to other regulations before they can lawfully operate upon the highways, which regulations are not imposed upon other private carriers similarly situated, and thereby appellants are denied the equal protection of the laws. (4) That other regulations to which appellants are subjected are not made applicable to persons using the highways in transportation of their own commodities under substantially similar conditions and thereby appellants are denied the equal protection of the laws.

To these contentions appellees reply—(a) That the act does not undertake to convert the contract carriers into common carriers, or to require them to devote their property to any different or greater public use than that to which they have already voluntarily dedicated it, or to render any service beyond that which they have contracted to render, but merely fixes reasonable conditions upon the permissive use which they make of public property as a place of business. (b) That the act is bottomed upon the state's power to protect its highways and remove traffic hazards, as well as upon its power and duty to foster and preserve a dependable transportation system for the whole people. (c) That the contract carriers reached by the act are, under conditions now ob-

taining upon the highways, engaged in a business affected with a public interest, and the reasonable regulation of their rates and practices is essential for the protection of that interest. (d) That the act is not discriminatory in the particulars asserted by appellants.

First. It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit. *Packard* v. *Banton*, 264 U. S. 140, 144, and cases cited; *Frost Trucking Co.* v. *R. R. Com.*, 271 U. S. 583, 592-593; *Hodge Co.* v. *Cincinnati*, 284 U. S. 335, 337; *Johnson Transfer & Freight Lines* v. *Perry*, 47 F. (2d) 900, 902; *Southern Motorways* v. *Perry*, 39 F. (2d) 145, 147; *People's Transit Co.* v. *Henshaw*, 20 F. (2d) 87, 89; *Weksler* v. *Collins*, 317 Ill. 132, 138-139; *Motor Coaches* v. *Public Utilities*, 125 Me. 63, 65.

Putting aside the question whether the statute may stand against the attack made under the due process of law clause, upon the theory that appellants, by reason of their use of the public highways, are engaged in a business impressed with a public interest, and the question whether it may be justified on the ground that, wholly apart from its relation to highway conservation, it is necessary in order to prevent impairment of the public service of authorized common carriers adequately serving the same territory, we confine our inquiry to the question whether, in the light of the broad general rule just stated, the statute may be construed and sustained as a constitutional exercise of the legislative power to regulate the use of the state highways. Provisions of the statute assailed on the ground that they are not highway regulations and violate the due process of law clause are: the requirement that the private contract carrier before engaging in business must obtain a permit upon considerations relating to the effect of their competition upon existing common carriers; the provision authorizing the railroad commission to fix the minimum rates of such private carriers operating in competition with common carriers, which shall not be less than the rates prescribed for common carriers for substantially the same service; and the requirement, as appellants interpret the statute, that such private carriers must furnish cargo insurance policies and bonds.

We are of opinion that neither by specific provision or provisions, nor by the statute considered as a whole, is there an attempt to convert private contract carriers by motor into common carriers. Certainly, the statute does not say so. Common carriers by motor and private contract carriers are classified separately and subjected to distinctly separate provisions. By § 1 (h), the contract carrier is defined as "any motor carrier . . . transporting property for compensation or hire over any highway in this state *other than as a common carrier.*" It is difficult to see how the legislature could more clearly have evinced an intention to avoid an attempt to convert the contract carrier into a common carrier. It is true that the regulations imposed upon the two classes are in some instances similar if not identical; but they are imposed upon each class considered by itself, and it does not follow that regulations appropriately imposed upon the business of a common carrier, may not also be appropriate to the business of a contract carrier.

Appellants, in support of their contention, rely upon prior decisions of this court; but there is nothing in any of them, as a brief review will disclose, which requires us to hold that the legislation here under review compels private contract carriers to assume the duties and obligations of common carriers, or interferes with their freedom to limit their business to that of carrying under private contracts as they have been wont to do.

Michigan Commission v. *Duke*, 266 U. S. 570, dealt with a state law which expressly provided that all persons engaged in the transportation of persons or property for hire by motor vehicle upon the public highways of the state should be common carriers, and that all laws of the state regulating transportation by other common carriers should apply with equal force and effect to such common carriers. It was upon this *express* provision that this court based its holding (pp. 577-578) that it was beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, since that would be to take private property for public use without just compensation in violation of the due process of law clause of the Fourteenth Amendment.

Buck v. *Kuykendall*, 267 U. S. 307, and *Bush Co.* v. *Maloy*, 267 U. S. 317, were cases which dealt with state statutes affecting inter-

state commerce and with discriminations relating thereto. No such questions are raised in respect of the application to appellants of the Texas statute now under consideration.

The question decided in *Frost Trucking Co.* v. *R. R. Com.*, 271 U. S. 583, differs entirely from that here presented. There (p. 592) the California supreme court had construed a provision of the state statute which required the private contract carrier to obtain not a permit, as here, but a certificate of public convenience and necessity before doing business over the state highways, as a condition obliging him to dedicate his property to the business of public transportation and to subject himself to all the duties and burdens imposed by the act upon common carriers. This court, in accordance with the settled rule, accepted that construction as binding and, in that view, said (p. 592):

". . . the case presented is not that of a private carrier who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier; but it is that of a private carrier who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the railroad commission. The certificate of public convenience, required by § 5, is exacted of a common carrier and is purely incidental to that status. The requirement does not apply to a private carrier *qua* private carrier, but to him only in his imposed statutory character of common carrier. Apart from that signification, so far as he is concerned, it does not exist."

On the contrary, the Texas statute in respect of permits deals exclusively with the private contract carrier, and requires the issue of the permit not to him in the imposed character of a common carrier, but in his actual character as a private contract carrier. If the California statute requiring a certificate had been thus interpreted by the highest court of the state, the foregoing quotation clearly suggests that our decision might have been otherwise.

Smith v. *Cahoon*, 283 U. S. 553, dealt with a Florida statute indiscriminately applying to all who operated motor vehicles for compensation or as common carriers over public highways, and prohibiting such operation without a certificate of public convenience and necessity, application for which was to be accompanied by a schedule of tariffs. No certificate was valid unless a bond were given by the applicant for protection against injuries resulting

from negligence, and for the protection of persons and property carried. The railroad commission was vested with authority to fix or approve rates, regulate service, prescribe methods of keeping accounts, etc. Schedules of rates were to be open to the public, and all alterations in tariffs were under the commission's control. The violation of any provision of the act was made a misdemeanor punishable by fine or imprisonment or by both. This court held that since the statute affixed the same conditions to all who applied for certificates, and embraced in those conditions a scheme of supervision and control which constitutionally could be applied only to common carriers, a private carrier for hire could not constitutionally be arrested under it for failure to procure a certificate or pay the tax required by the act. It further held that if the statute were regarded as intended to afford one constitutional scheme for common carriers and another for private carriers, it failed to define the obligations of private carriers with the certainty required of criminal statutes, and was, therefore void; and that this defect was not removed by a decision of the state court declaring the provisions separable and that only those legally applicable to private carriers were intended to apply to them, without also deciding which provisions were so applicable. "No separate scheme of regulation," we said (p. 563), "can be discerned in the terms of the Act with respect to those considerations of safety and proper operation affecting the use of highways which may appropriately relate to private carriers as well as to common carriers."

The vice of the statute was that all carriers for hire, whether public or private, were put upon the same footing by explicit provisions which could not be severed so as to afford one valid scheme for common carriers and another for private carriers, with the result that until the separability of these provisions should be determined by competent authority, they were void for uncertainty. In the Texas statute no such uncertainty exists. The provisions intended to be applicable to contract carriers are distinctly set forth and separately stated, plainly leaving for determination only the question whether such provisions, or any of them, are invalid as so applied. *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 364.

We come, then, to consider the challenged provisions of the statute under review, in the light of their exclusive relation to

contract carriers, unembarrassed by any previous ruling of this court. In view of the conclusions to which we shall come, it is not necessary to determine whether the operation of trucks for the transportation of freight under private contracts, carried into effect by the use of the public highways, is a business impressed with a public interest.

There is ample support in the record for the following findings of the court below:

"The evidence shows there are 1,360,413 motor vehicles other than either common or contract carriers or commercial carriers of passengers registered for use on the highways of Texas, and that it is one of the purposes of the Legislature to make the use of the highways safer and more convenient for these private operators, involving incidentally either a lessening of commercial transportation on the highways, or such improvement in their character and practices as to effect the same result. In this connection, the Court finds that the provisions of the statute carried out in accordance with the declaration of purpose and the specific instructions therein will have the effect either of lessening commercial traffic on the highways, or, by bringing it under careful and adequate supervision, of making the use thereof by the very large number of owners and operators of private motor vehicles safer and more convenient.

"The increase of unregulated truck transportation over the highways had developed a difficult and perplexing public problem to the extent that the Governor of the State in his message to the Legislature called attention to the fact that the highways were being taken and badly used by motor vehicles engaged in the transportation of freight for hire.

"The number of contract carriers on the highways of Texas having rapidly grown, as elsewhere found, the business they conduct now exists as a very large factor in commercial transportation. The court finds that it is not the effect of one such carrier or a limited number thereof which produced the serious problem with which the Legislature of Texas purported to deal and has dealt, but it is the effect, in the aggregate, of such contract carriers that is important.

. . . . . .

"The inevitable result of the continuance of the enormous increase of so-called private carriers for hire and the continual decrease in the number of common carriers holding certificates of public convenience and necessity will be the practical disappearance altogether of common carriers from the roads.

"The Legislature has declared that all of the available carriage service, including common carriage by rail and road and contract

carriage by road, are so interdependent that the public may not continue to have a safe and dependable transportation system unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulations bringing their service into relation with common carriers, and we find the evidence supports this finding.

"The requirement of the Texas statute under attack that contract carriers must have a permit with the prerequisites in the statute for such a permit, is reasonable, particularly in that this method enables the State to know who will use its highways and to more efficiently regulate such use. The permit system has immediate relation to the condition of the roads and bridges, congestion of the highways and the character of equipment to be used, which relates not only to the effect of the operations on business but also to the problem of safety and convenience in use of the highway.

"The experience of the Railroad Commission supports the Legislative declaration that unregulated contract carriers under the former law effectively prevents the primary purpose of fostering and conserving for the public welfare all commercial transportation on the highways which it has been the purpose of the laws of Texas, under rules of the Commission, to foster."

These and other findings and the evidence contained in the record conclusively show that during recent years the unregulated use of the highways of the state by a vast and constantly growing number of private contract carriers has had the effect of greatly decreasing the freight which would be carried by railroads within the state, and, in consequence, adding to the burden upon the highways. Certainly, the removal or amelioration of that burden, with its resulting injury to the highways, interference with their primary use, danger and inconvenience, is a legitimate subject for the exercise of the state legislative power. And that this was one of the chief ends sought to be accomplished by the provisions in question, the record amply establishes.

The assailed provisions, in this view, are not ends in and of themselves, but means to the legitimate end of conserving the highways. The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature, and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means

and the end. Compare *M'Culloch* v. *Maryland*, 4 Wheat. 316, 409-410, 419, 421, 423; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549; *Legal Tender Cases*, 12 Wall. 457, 539-540, 541, 542, 543; Pomeroy, Constitutional Law, 9th Ed., § 268a.

Turning our attention then to the provision for permits, it is to be observed that the requirement is not that the private contract carrier shall obtain a certificate of public convenience and necessity, but that he shall obtain a permit, the issue of which is made dependent upon the condition that the efficiency of common carrier service then adequately serving the same territory shall not be impaired. Does the required relation here exist between the condition imposed and the end sought? We think it does. But in any event, if the legislature so concluded, as it evidently did, that conclusion must stand, since we are not able to say that in reaching it that body was manifestly wrong. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 30-31. Compare *Euclid* v. *Ambler Co.*, 272 U. S. 365, 395; *Zahn* v. *Bd. of Public Works*, 274 U. S. 325, 328. Debatable questions of this character are not for the courts, but for the legislature, which is entitled to form its own judgment. *Sproles* v. *Binford*, 286 U. S. 374, 388-389. Leaving out of consideration common carriers by trucks, impairment of the railway freight service, in the very nature of things, must result, to some degree, in adding to the burden imposed upon the highways. Or stated conversely, any diversion of traffic from the highways to the railroads must correspondingly relieve the former, and, therefore, contribute directly to their conservation. There is thus a substantial relation between the means here adopted and the end sought. This is made plain by the *Sproles* case, *supra* (p. 394):

"The State has a vital interest in the appropriate utilization of the railroads which serve its people, as well as in the proper maintenance of its highways as safe and convenient facilities. The State provides its highways and pays for their upkeep. Its people make railroad transportation possible by the payment of transportation charges. It cannot be said that the State is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. The use of highways for truck transportation has its manifest convenience, but we perceive no constitutional ground for denying to the State the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should

not be inconvenienced by inordinate uses of its highways for purposes of gain. This is not a case of a denial of the use of the highways to one class of citizens as opposed to another, or of limitations having no appropriate relation to highway protection."

What has just been said applies in the main to the other challenged provision authorizing the commission to prescribe minimum rates not less than those prescribed for common carriers for substantially the same service. This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by diverting traffic from them to the railroads. The authority is limited to the fixing of minimum rates. The contract carrier may not charge less than the rates so fixed, but is left free to charge as much more as he sees fit and can obtain. Undoubtedly, this interferes with the freedom of the parties to contract, but it is not such an interferenee as the Fourteenth Amendment forbids. While freedom of contract is the general rule, it is nevertheless not absolute but subject to a great variety of legitimate restraints, among which are such as are required for the safety and welfare of the state and its inhabitants. *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, 22; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 202; *Chicago, B. & Quincy R. R. Co.* v. *McGuire, id.*, 549, 567, *et seq.*; *Balt. & Ohio R. R.* v. *Int. Com. Comm.*, 221 U. S. 612, 619. When the exercise of that freedom conflicts with the power and duty of the state to safeguard its property from injury and preserve it for those uses for which it was primarily designed, such freedom may be regulated and limited to the extent which reasonably may be necessary to carry the power and duty into effect. Compare *McLean* v. *Arkansas*, 211 U. S. 539, 545; *Miller* v. *Wilson*, 236 U. S. 373, 380; *Frisbie* v. *United States*, 157 U. S. 160, 165; *Highland* v. *Russell Car Co.*, 279 U. S. 253, 261; *Adkins* v. *Children's Hospital*, 261 U. S. 525, 546.

Here the circumstance which justifies what otherwise might be an unconstitutional interference with the freedom of private contract is that the contract calls for a service, the performance of which contemplates the use of facilities belonging to the state; and it would be strange doctrine which, while recognizing the power of the state to regulate the use itself, would deny its power to

regulate the contract so far as it contemplates the use. "Contracts which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the State." *Sproles* v. *Binford, supra,* at pp. 390-391, and authorities cited. The principle that Congress may regulate private contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created, *Highland* v. *Russell Car Co., supra,* at p. 261, applies to a state under like circumstances.

An entirely different question was presented in the *Frost Trucking* case, *supra.* There, as we pointed out (pp. 591-592), the California act, as construed by the highest court of the state, was in no real sense a regulation of the use of the public highways. Its purpose was to protect the business of those who were common carriers in fact by controlling competitive conditions. Protection or conservation of the highways was not involved.* The condition which constrained the private contract carrier to become a common carrier, therefore, had no relation to the highways. In this view, the use of the highways furnished a purely unrelated occasion for imposing the unconstitutional condition, affording no firmer basis for that condition than would have been the case if the contract carrier were using a road in private ownership.

The Texas statute, on the contrary, rests definitely upon the policy of highway conservation, and the provision now under review is governed by the same principle as that which recognizes the authority of a state to prescribe the conditions upon which it will permit public work to be done on its behalf. Among such conditions it may prescribe that laborers employed by a contractor to do such work shall not be permitted to labor more than eight hours per day. *Atkin* v. *Kansas,* 191 U. S. 207. "It cannot be deemed a part of the liberty of any contractor," it is said at pp. 222-223, "that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its

*The California Supreme Court expressly said that the act "does not purport to be and is not in fact a regulation of the *use* of the highways." 197 Cal. 230, 244.

behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." See also *Ellis* v. *United States*, 206 U. S. 246, 256; *Heim* v. *McCall*, 239 U. S. 175, 191. It may be said with like force that it belongs to the state, "as master in its own house," to prescribe the terms upon which persons will be permitted to contract in respect of the use of the public highways for purposes of gain. See *Hodge Co.* v. *Cincinnati*, 284 U. S. 335, 337.

We need not consider whether the act in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid. *Ellis* v. *United States*, 206 U. S. 246, 256. Nor does it matter that the legislation has the result of modifying or abrogating contracts already in effect. Such contracts are to be regarded as having been made subject to the future exercise of the constitutional power of the state. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 480, *et seq.*; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400; *Sproles* v. *Binford, supra*, at pp. 390-391.

The provision of § 13, requiring every motor carrier, whether operating under permit or certificate, to furnish a bond and policy of insurance conditioned that the obligor will pay, among other things, for loss of, or injury to, property arising out of the actual operation of the carrier, is construed by appellants as including cargoes carried by them, and is assailed as a requirement bearing no relation to public safety, but as an attempt to condition the purely private contractual relationship between shipper and private carrier. It is said that the proviso which prohibits the commission from requiring insurance covering loss of, or damage to, *cargo* in an excessive amount requires the construction suggested. So far as appears no attempt yet has been made to enforce the provision against any of these appellants, and until that is done they have no occasion to complain. Moreover, no state court thus far has dealt with the question, and unless obliged to do otherwise, we should not adopt a construction which might render the

provision of doubtful validity, but await a determination of the matter by the courts of the state. *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 186.

Second. The contention that the act, in certain particulars, denies appellants the equal protection of the laws requires only brief consideration. Section 6 (d), which authorizes the issue of special permits to persons engaged in the business of transporting certain named commodities upon such terms, conditions and restrictions as the railroad commission may deem proper, etc., is said to discriminate arbitrarily against carriers of commodities of a similar character, in that the selected carriers are not required to comply with many of the onerous provisions of the statute. It is by no means clear that such is the case, and it is asserted on behalf of appellees, and not disputed, that the Attorney General of the state, in an official opinion, has construed the provision to mean that persons operating under these special permits either as contract or common carriers are subject to the provisions of the act applicable to such carriers, and that this construction has been accepted by the railroad commission. There is nothing in the record to suggest that the provision has been otherwise applied. Appellants in this regard, therefore, have no ground upon which to base a complaint.

Nor do we find merit in the further contention that the act arbitrarily discriminates against appellants because it does not apply to persons, commonly known as "shipper-owners," who are transporting their own commodities under substantially similar conditions. It is obvious that certain provisions of the statute, like that requiring the commission to fix minimum rates, can have no application to such owners. We are of opinion, from an examination of the act and the companion act which was upheld by this court in *Sproles* v. *Binford, supra,* that all provisions relating to contract carriers which are germane to shipper-owners are made applicable to them. In any event, it is not shown that the act thus far has been so administered as to result in any unlawful discrimination.

The decree of the court below is

Affirmed.

Mr. Justice BUTLER dissents.